92-1564

No. 92-___

In The

Supreme Court of the United States

October Term, 1992

MERRITT E. JONES, individually; PAMELA JONES, by Merritt E. Jones, her father and next friend; JOHN DOE, individually; JANE DOE, by John Doe, her father and next friend,

Petitioners,

v.

CLEAR CREEK INDEPENDENT SCHOOL DISTRICT,

Respondent.

Petition For A Writ Of *Certiorari*
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Clear Creek Independent School District's policy of allowing students to deliver prayers that are approved by school officials as part of commencement exercises violates the Establishment Clause as a matter of law?

LIST OF PARTIES

The caption of the case contains the names of all parties.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit is reported at 976 F.2d 963 (1992) and is reprinted in the appendix. (App. 1). An earlier decision of the Court of Appeals in the same case is reported at 930 F.2d 416 and is reprinted in the appendix (App. 24). The decision of the United States District Court for the Southern District of Texas is unreported. (App. 46).

JURISDICTION

The district court issued its decision granting summary judgment for the Respondents on May 16, 1989.

Petitioners filed their Notice of Appeal on June 9, 1989. On April 18, 1991 the Fifth Circuit affirmed the judgment of the district court.

On June 29, 1992, the Supreme Court granted Petitioners' petition for *certiorari* and vacated the judgment of the Court of Appeals. *Jones v. Clear Creek Indep. School District*, 112 S. Ct. 3020 (1992) (App. 23). It remanded the case to the Court of Appeals for consideration in light of *Lee v. Weisman*, 112 S. Ct. 2649 (1992).

On November 24, 1992, the Court of Appeals again affirmed the judgment of the district court. Petitioners filed a timely motion for rehearing *en banc*. When no member of the Fifth Circuit voted to grant *en banc* rehearing, the panel treated the motion as a motion for rehearing and denied it on December 28, 1992. (App. 22).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably

to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

A. Factual Background

Petitioner, Merritt E. Jones, is the father of Petitioner, Pamela Jones. Pamela is a 1987 graduate of Clear Lake High School. Petitioner, John Doe, is the father of Petitioner, Jane Doe. Jane is a 1988 graduate of Clear Lake High School. After an Unopposed Motion for Leave to Proceed in Pseudonyms, the Does adopted the pseudonyms to escape retribution from individuals who strongly oppose their position. Petitioners will be referred to collectively as "Jones."

Pamela Jones and Jane Doe were graduating seniors at Clear Lake High School, a school operated by Clear Creek Independent School District ("Clear Creek") in 1987 and 1988, respectively. All of the Petitioners desired to attend the graduation ceremony of Jane Doe's high school class, which was scheduled for June 1988. Graduation ceremonies at Clear Creek's Clear Lake High School have been traditionally open to all relatives and friends of graduating seniors. Petitioners were invited to Petitioner Jane Doe's graduation ceremony in 1988. All four of the Petitioners have numerous friends and acquaintances who attend, and whose children attend, Clear Creek's Schools. The Petitioners can therefore reasonably expect to have occasion to attend graduation ceremonies at Clear Lake High School for years to come. Petitioners,

Merritt Jones and John Doe, are taxpayers in the Clear Creek School District.

Graduation ceremonies at Clear Lake High School have for some years included an invocation during which a member of the senior class leads the audience in prayer. The ceremony is under the direction and control of school district administrators. A copy of the 1986 Clear Lake High School commencement program containing reference to the invocation and benediction was before the trial court. In 1986, which was the graduation year of Merritt Jones' older child, the invocation and benediction at the ceremony were as follows:

INVOCATION

Lord,

Thank you for allowing us to attain this milestone in our lives. Help us all to remember your great kindness and love [unintelligible] we celebrate this great accomplishment in our lives. Since the high school years are a painful growing time undoubtedly, for each, the disappointments and mishaps that have occurred over the last years have just seemed [backed up?] When we take the time in the future to talk over our high school years in the halls of memories, the victories [unintelligible], the successes and defeats [unintelligible], and the friendships above all that never ever meet will all shine through with brilliant radiance and happiness that will only become more meaningful and beautiful as the years pass us by. Thankfully, nothing short of your Gospel and power will ever eclipse these great visions and memories. It

> is these unequivocal times that we are here to commemorate this afternoon. [Sentence unintelligible] Just bless and keep each of us over the years 'til someday we will all meet again. Amen.

BENEDICTION

> Let us pray.
>
> Dear Lord,
>
> As we emerge from the secluded passages please inspire us with your grace and great words of [unintelligible] heaven. Instill in us the spirit of dignity and pride. Inspire us to face all our challenges with confidence and turn obstacles into steppingstones to success. Amen.

Prior to the filing of this lawsuit, the decision whether or not to include invocations and benedictions in each year's proceedings had been made informally by a group consisting of the senior class principal (a school district administrator), the student officers of the senior class, and the senior class valedictorians. In December 1987, a few weeks before the scheduled trial in the district court, the school board adopted a resolution setting forth, for the first time in written form, its policy concerning graduation prayer. The operative portion of the resolution provides that the decision of whether or not to include prayers in graduation ceremonies "shall rest within the discretion of the graduating senior class, with the advice and counsel of the senior class principal." Although the Court of Appeals assumes in its opinion that the school board resolution contemplates the decision being made in some democratic fashion by the senior class as a whole, there is nothing in the record that

indicates that the actual practice has been any different than the informal consultation practiced before the adoption of the resolution. In fact, the "whereas clauses" of the resolution state that the resolution is simply a codification of prior practice.[1] Deposition testimony included in the appellate record indicates that the prior practice was for the senior class principal to review the text of prayers composed by students.

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[1] The text of the resolution is as follows:

WHEREAS, invocations and benedictions have been a ceremonial tradition at graduation exercises in this District since its inception, and at public school commencements, generally, since the beginning of public schools in this country; and

WHEREAS, invocations and benedictions at graduation exercises serve to solemnize the occasion, expressing confidence in the future, and encouraging recognition of what is worthy in our society; and

WHEREAS, a controversy now exists regarding the use of invocations and benedictions at high school graduation ceremonies and the practice of this district in connection therewith; and

WHEREAS, to the extent there may be any misunderstanding, it is in the best interests of the students, their parents and the District, for this Board to make the practice of the District clearly and expressly known;

NOW THEREFORE, be it resolved by the Board of Trustees of Clear Creek Independent School District that:

1. The use of an invocation and/or benediction at high school graduation exercise shall rest within the discretion of the graduating senior class, with the advice and counsel of the senior class principal;

2. The invocation and benediction, if used, shall be given by a student volunteer; and

3. Consistent with the principle of equal liberty of conscience, the invocation and benediction shall be nonsectarian and nonproselytizing in nature.

By passing the December resolution, the school district asserted and continues to assert its right to include prayers in its high school graduation ceremony, so long as they are delivered by a student and are "nonsectarian and non-proselytizing."

B. Proceedings Below

On May 11, 1987, Petitioners filed suit pursuant to 42 U.S.C. § 1983, challenging as unconstitutional Clear Creek's policy of allowing invocations containing traditional Christian prayer at its high school graduation ceremonies. Petitioners sought a permanent injunction and declaratory relief that the practice and custom of the Respondent violates Petitioners' rights under the First Amendment to the United States Constitution.

On January 19, 1988, Respondent filed a motion for summary judgment and on May 12, 1989, the district court granted Respondent's motion. Petitioners appealed to the Fifth Circuit.

In its opinion, the district court applied the tripartite test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The district court rejected the Respondent's request to apply the "traditional practice test" developed in *Marsh v. Chambers*, 463 U.S. 783 (1983). Relying on the frequency and duration of the Invocation and Benediction, the age of the students subjected to it, the conduct of the commencement exercises off of school grounds and the voluntary nature of the offering, the district court concluded that under *Lemon* the Respondent's practice does not constitute state endorsement of religion.

On appeal, the Fifth Circuit affirmed the district court based on its review under *Lemon*. The court found that although the Respondent's policy allows invocations addressing a deity, "this is as consistent with secular solemnizing purpose as any religious purpose." *Jones v. Clear Creek Indep. School Dist.*, 930 F.2d 416, 420 (1991) ("*Jones I*"). In analyzing the "effect" prong of the *Lemon* test, the court found that the age of the students attending the commencement exercises, the effect of the Invocation on the entire ceremony, the frequency of the Invocation's offering, the Invocation's length, the policy's expressed denominational neutrality and "voluntary observance provisions" together demonstrated that the effect of Clear Creek's policy is not to establish religion. 930 F.2d at 421-422. Finally, the court found that Respondent's policy requiring its officials to screen proposed invocations for sectarian or proselytizing content does not constitute an impermissible entanglement between school authorities and religious institutions. *Id.* at 423.

Jones sought *certiorari* review of *Jones I*. On June 29, 1992, this Court granted *certiorari* and summarily remanded the case to the Court of Appeals. On remand, the Court of Appeals once again affirmed the district court's judgment, purportedly under the principals announced by the Supreme Court in *Lee v. Weisman, supra*. The Court of Appeals held, basically, that the facts at bar were distinguishable from those in *Lee* because the decision whether or not to include the prayer was made by the senior class, because the prayer was delivered by a student rather than a clergyman, and because attendance at the Clear Lake High School graduation was somehow less coerced than that in *Lee*.

REASON FOR GRANTING THE WRIT

I. IN THIS CASE, THE FIFTH CIRCUIT HAS ENTERED AN OPINION CONTRARY TO THE COURT'S PRECEDENT

This case raises the same questions the Court answered in *Lee v. Weisman*, 112 S. Ct. 2649 (1992). In *Lee*, the Court concluded a religious exercise may not be conducted at a graduation ceremony. *See* 112 S. Ct. at 2661. Following the Court's ruling in *Lee*, the Fifth Circuit held that a school district may permit "student volunteers to deliver nonsectarian, nonproselytizing invocations at their graduation ceremonies." *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963, 964 (5th Cir. 1992).

In *Lee*, the school district's policy allowed the principal, Robert E. Lee, to invite a clergyman to deliver an invocation and benediction at high school graduations. 112 S. Ct. at 2652. Mr. Lee advised the Rabbi that he was invited to address the graduates and to make the benediction and invocation nonsectarian. *Id.* Clear Creek's policy allows a student to lead those gathered for graduation in prayer.

Clear Creek's policy provides:

1. [t]he use of an invocation and/or benediction at high school graduation exercise[s] shall rest within the discretion of the graduating senior class, with the advice and counsel of the senior class principal;

2. [t]he invocation and benediction, if used, shall be given by a student volunteer; and

> 3. [c]onsistent with the principle of equal liberty of conscience, the invocation and benediction shall be nonsectarian and nonproselytizing in nature.

Jones I, 930 F.2d at 417. Clear Creek's resolution is not materially different from Providence's prohibited policy and in this case is subject to the Court's ruling in *Lee*.[2] The "dominant facts" that marked and controlled *Lee* were:

> State officials direct their performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools. Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are in a fair and real sense, obligatory, though the school district does not require attendance as a condition for a receipt of the diploma.

112 S. Ct. at 2649.

To distinguish this case from *Lee*, the Fifth Circuit viewed this case as an acceptable accommodation of a majority's wishes to have commencement prayers. *See* 977 F.2d at 969 (accommodation of majority of graduating

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[2] A distinction between Providence's policy allowing a clergyman to lead the prayer and Clear Creek's requirement that a student make the offering is not meaningful. In *Lee*, the Court noted the conflict between the First Circuit's opinion, 908 F.2d 1090 (1990), and the Sixth Circuit's opinion in *Stein v. Plainwell Community Schools*, 822 F.2d 1406 (1987). 112 S. Ct. at 2654. *Stein* involved student offered commencement prayers. 822 F.2d at 1407. In affirming the First Circuit's opinion in *Lee*, 112 S. Ct. at 2655, the Court did not distinguish *Stein* from *Lee* on that, or any other basis.

seniors' desires). The Fifth Circuit also upheld the policy under its understanding of the Court's Establishment Clause cases.

To support its accommodation argument, the Fifth Circuit found that *Jones* "more closely parallels" *Westside Community Sch. v. Mergens*, 496 U.S. 226 (1990), than *Lee*. *See* 977 F.2d at 968-69 (concerning endorsement). Commencement questions, however, do not require accommodation analysis. *See Lee*, 112 S. Ct. at 2655 (*Lee* does not require review of accommodation principles because controlling precedents render prayer at commencement exercises unconstitutional). To be sure, this is a commencement prayer case. *Jones II*, 977 F.2d at 965.

In *Jones II*, the Fifth Circuit reasoned that Clear Creek was simply accommodating the wishes of a majority of the senior class in furnishing a platform for a student-composed prayer. 977 F.2d at 969. This accommodation argument underpinned much of the Fifth Circuit's opinion and served as a basis for distinguishing this case from *Lee*. *See Jones II*, 977 F.2d at 968 (comparing this case to *Mergens* and *Lynch v. Donnelly*, 465 U.S. 668 (1984)). In *Lee*, the Court made plain that the offering of prayers at public high school commencement exercises cannot be justified as an accommodation of the majority's wishes. 112 S. Ct. at 2660. Denied this position, *Jones II* must be scrutinized like other school prayer cases. *See Lee*, 112 S. Ct. 2660 (commencement like classroom); *see also Lee*, 112 S. Ct. at 2663-64 n.4 (Blackman, J. concurring) (Court applies *Lemon* vigorously in every school prayer case).

In the course of applying the Court's standard for Establishment Clause cases, *see Lee*, 112 S. Ct. at 2663 n.4 (noting *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Fifth Circuit found two additional tests, "endorsement" and "coercion". *See Jones II*, 977 F.2d at 966-969. Discussion of the Fifth Circuit's five tests follows.

In *Lemon*, the Court held governmental practices must (1) reflect a clearly secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) avoid excessive government entanglement with religion. *Lee*, 112 S. Ct. at 2654. In *Jones II*, the Fifth Circuit misapplied this test and then used the endorsement and coercion analysis it found in the Court's cases to uphold Clear Creek's policy. *See* 977 F.2d at 966-69.

Contrary to the statement in *Jones II*, finding any secular purpose in Clear Creek's policy, 977 F.2d at 966, is not sufficient. *Lee*, 112 S. Ct. at 2654 (secular purpose must be clear); *see also Jones II*, 977 F.2d at 966 n.6 (noting secular purpose must be clear). It is difficult to see a clear secular purpose in the policy. The Fifth Circuit's argument that the policy fosters the legitimate purpose of solemnizing commencement exercises rests on the uninstructive holding in *County of Allegheny v. ACLU*, 492 U.S. 537 (1989). *See* 977 F.2d at 966. *Allegheny* does not save Clear Creek's policy because the Court's precedents relating to religious activities in schools control resolution of commencement prayer cases and *Allegheny* is not a school case. *See Lee*, 112 S. Ct. at 2655. The Fifth Circuit offered no authority for its proposition that prayer is a proper method for solemnizing commencement exercise. *Lee*, in fact, strongly suggests that prayers may not be offered at commencement exercises for any purpose. *See* 112 S. Ct.

at 2656 (government cannot seek to find a prayer unoffensive to all for graduation ceremony). Furthermore, the record before the Fifth Circuit contained no evidence of Clear Creek's purpose in adopting the policy. *See* 977 F.2d at 965 (affirming summary judgment).

The second prong of the *Lemon* test, the primary effect of the challenged conduct, 403 U.S. at 612, was improperly applied in *Jones II*. The Fifth Circuit reasoned that because the *Lee* Court did not address whether "solemnization is a legitimate secular purpose of ceremonial prayer," solemnizing commencement exercises with prayer is appropriate. *See Jones II*, 977 F.2d at 966-67.

The issue was not addressed in *Lee* because the Court found offering commencement prayers involves the government in religious activity so pervasively that the practice is unconstitutional without further inquiry. 112 S. Ct. at 2655. The *Lemon* question is not what effect Clear Creek intended the policy to have, but "the legitimacy of its undertaking the enterprise at all when the object is to produce a prayer to be used in a formal religious exercise. . . . " *Lee*, 112 S. Ct. at 2656; *see also Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Conner J. concurring) (effect prong asks whether practice conveys a message of endorsement).

The Fifth Circuit's entanglement analysis under *Lemon* was also flawed. The Fifth Circuit attempted to distinguish *Jones II* from *Lee* on the basis that the Establishment Clause prohibits only entanglement between the state and religious institutions. 977 F.2d at 967-68. The Fifth Circuit found that because a student offers the prayer, the policy avoids excessive entanglement between

the state and religion. *Id.* This conclusion misinterprets the law and avoids the facts. *Lemon* requires government to avoid entanglement with religion, not just religious institutions. 403 U.S. at 613. Additionally, Clear Creek's policy requires the principal to advise and counsel students on the prayer's content. *See* 977 F.2d at 964 n.1. The state cannot edit prayers for presentation at school events. *See Lee*, 112 S. Ct. at 2656 (quoting *Engel v. Vitale*, 370 U.S. 421, 425 (1962)). School officials may not "assist in composing prayers as an incident to a formal exercise for their students." *Lee*, 112 S. Ct. at 2657 (citation omitted).

After dispatching *Lemon*, the Fifth Circuit turned to the first of two other tests it found in the Court's cases, an endorsement test. *See Jones II*, 977 F.2d at 968.[3] After announcing that the state may not endorse religion, the Fifth Circuit relied on *Mergens* to conclude that Clear Creek's policy simply accommodates rather than endorses religion. 977 F.2d at 968-69. This point rests on the conclusion the Court found unacceptable in *Lee*, that commencement prayer should be viewed as a free exercise under the First Amendment. 112 S. Ct. at 2655 (free exercise "does not supersede the fundamental limitations imposed by the Establishment Clause.") *Mergens* involved

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[3] Justice O'Conner suggested and defined an endorsement analysis of Establishment Clause questions in her concurrence in *Lynch*. 465 U.S. at 688. As compared to excessive entanglement, government endorsement of religion is a more direct infringement on the Establishment Clause. *Id.* "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community. . . . " *Id.* The Court used the same logic in *Lee*. 112 S. Ct. at 2658.

after-school club activity, not a school-sponsored event. 496 U.S. 226, 247-253. Unlike extracurricular activities, graduation is not an optional exercise. *See Lee*, 112 S. Ct. at 2660 (graduation is the "one school event most important for the student to attend").

The Fifth Circuit concluded that Clear Creek's policy is not an impermissible endorsement because it submits the decision to have a graduation prayer to the majority of the senior class.[4] 977 F.2d at 696. Clear Creek cannot excuse its policy on the grounds that it represents the wishes of a majority. *Lee*, 112 S. Ct. 2660 (under the Establishment Clause, the majority's wishes are not controlling.) The methods Clear Creek uses to present prayers at commencement exercises is immaterial because the process cannot absolve an unconstitutional result.

To assume, as the Fifth Circuit did, that "a majority of students can do what the State acting on its own cannot do to incorporate prayer in public high school graduation ceremonies," ignores established law. *See* 977 F.2d at 972. The state controls commencement exercises. *Lee*, 112 S. Ct. at 2660 (citation omitted). Graduation is a state-sponsored activity. Prayers given at commencement under school policy are offered by the state. *See* 112 S. Ct. at 2655. Finally, commencement exercises are analogous to the classroom, *Lee*, 112 S. Ct. at 2660, where student

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[4] The content of the commencement invocation and benediction are edited by the senior class principal. 977 F.2d at 964 n.1. School official may not assist in composing prayers. *Lee*, 112 S. Ct. at 2657 (citation omitted). The record does not support the Fifth Circuit's suggestion that the content of the prayer is determined exclusively by the senior class.

volunteers may not deliver prayers, *Karen B. v. Treen*, 653 F.2d 897, 899 (5th Cir. Unit A 1981), *aff'd. mem.*, 455 U.S. 913 (1982).

After its endorsement analysis, the Fifth Circuit turned to the three elements of its coercion test. These are whether (1) the governments directs, (2) a formal exercise, (3) in such a way as to oblige the participation of objectors. *Jones II*, 977 F.2d at 970 (citation omitted).

In its "direction" discussion, the Fifth Circuit distinguished *Lee* on the grounds that the Clear Creek policy does not place the content of graduation prayers in the direct and complete control of the state. As the Court noted in *Lee*, control of graduation lies in Clear Creek. 112 S. Ct. at 2660. Moreover, Clear Creek controls the content of the invocation and benediction because the prayer must be submitted to the class principal for review before it may be offered at the commencement. *Jones II*, 977 F.2d at 964 n.1. The Fifth Circuit stated that "in evaluating the Resolution's facial constitutionality, we are only concerned with whether the resolution necessarily charges government with the decision of whether to include invocations." 977 F.2d at 970. The Fifth Circuit then concluded that "[u]nlike the policy in issue in *Lee*, the Resolution does not." 977 F.2d at 970-71. Because Clear Creek controls commencement completely, allowing prayer is as inappropriate as requiring it. Clear Creek's policy requires the principal to review the proposed prayer and determine whether it offends the First Amendment. Clear Creek simply performs the review Providence left to Rabbi Gutterman - to decide that the prayer was acceptable. Substituting its principal for a Rabbi does not save Clear Creek's policy.

Indeed, to the extent that it makes any difference at all, the fact that a student delivers the prayer at Clear Lake High School, while an outside clergyman delivered it in *Lee*, cuts in the opposite direction from that supposed by the Fifth Circuit's opinion. Because of the extent to which school officials may and, in fact, do exercise control over student speech in the course of officially sponsored school activities, *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 562 (1988), a student leading a public prayer in the course of a public high school graduation ceremony is more likely to be perceived as constituting a governmental endorsement of religion than is a prayer delivered by an adult who is not affiliated with the school. In the case at bar, in fact, the school district exercises its power over student speech by requiring in its resolution that the decision whether or not to include prayer in the graduation be made with the advice and counsel of the senior principal and by allowing only those prayers that the district determines to be suitably nonsectarian. By contrast, the school district's control over the content of Rabbi Gutterman's prayer in *Lee* was limited to providing him with a book, "Guidelines for Civic Occasions," which contained suggestions for suitably nonsectarian prayers. The Court's opinion in *Lee* characterized the school district's actions as the district attempting "to compose official prayers." 112 S. Ct. at 2656, quoting *Engel v. Vitale*, 370 U.S. 421 (1962). Clear Creek's asserted control over the prayers recited by its student speakers is certainly greater than that denounced in *Lee*.

The second prong of the Fifth Circuit's coercion analysis led it to conclude that the graduation prayer was not a "formal religious exercise." The Fifth Circuit found this

by deciding that the resolution "tolerates nonsectarian, nonproselytizing prayer, but does not require it or favor it." 977 F.2d at 971. Commencement prayers are formal religious exercises. *Lee*, 112 S. Ct., at 2656. Additionally, under the Fifth Circuit's own precedent, prayer is inherently religious. *See Treen*, 683 F.2d at 901.

The Fifth Circuit determined that the policy did not oblige members of the graduating class who objected to the offering of the prayer to participate in an objectionable manner. 977 F.2d at 971.

> We think that the graduation prayers permitted by the Resolution place less psychological pressure then the prayers at issue in *Lee* because all students, *after having participated in the decision of whether prayers will be given*, are aware that any prayers represent the will of their peers, who are less able to coerce participation than an authority figure from the state or clergy.

977 F.2d at 971 (emphasis in original). Knowing that the majority wishes to abrogate rights under the First Amendment does not make the result any more acceptable. *See Lee*, 112 S. Ct. at 2660 ("Constitution forbids the state to exact religious conformity" as the price of attending commencement). The Establishment Clause is expressly designed as a protection for religious minorities against the majority's power to favor its own faith and render non-believers second-class citizens of the civil community. No one would seriously argue that a school district could render daily classroom prayers constitutional by the simple expedient of conducting a referendum of the student body. The Fifth Circuit opinion suggests no reason why a vote of the senior class should

be construed as having the effect of converting otherwise unconstitutional school prayer into a constitutional free exercise of religion.

Lee v. Weisman is merely the most recent case in which the Court has found that the danger of unlawful establishment of religion is particularly high in the context of public schools. Organized religious activities in public schools are almost always an unconstitutional establishment of religion because schools are not traditional fora for free speech and students are not, therefore inclined to distinguish between messages compelled by school authorities and those merely permitted by them. The only case in which the Supreme Court has upheld organized religious activities in the public schools is *Westside Community Schools v. Mergens,* 110 S. Ct. 2356 (1990), and, because of its uniqueness, the Fifth Circuit relies heavily on it in *Jones II.* However, *Mergens* rests its holding largely on the fact that the religious clubs it compelled were wholly student-initiated and student-run, met outside normal school hours, were not led or sponsored by school officials and were organized in schools which had already created an open forum by recognizing other non-curricular clubs. Clear Lake High School's graduation ceremony, like that in *Lee* and most public schools, are clearly full-blown official school functions that cannot be mistaken for a private student club or open forum. Given the total absence of any indication that Respondent has treated its graduation exercises as afora for student free speech[5] *Mergens* has no applicability to the case at bar.

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[5] Not only is the appellate record void of any indication that the past practice had opened graduation ceremonies to student free speech, but the resolution by which Respondent memorialized its policy contains not even a hint that the school

In *Lee v. Weisman*, this Court affirmed again that official prayer has no place in our public schools. The distinctions between the facts of the case at bar and those in *Lee* are insignificant and are clearly not sufficient to justify a different outcome than that in *Lee*.

II. CONCLUSION

For the reasons stated herein, the Petition for Writ of Certiorari should be granted in this case.

Respectfully submitted this 25 day of March, 1993.

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DATED: March 25, 1993.

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board was allowing prayers because it was compelled to do so as an aspect of students' right of free speech. Rather, the resolution justifies the practice as a method of solemnization of the ceremony.

Merrit E. JONES, on his behalf and as next friend of Pamela Jones, a child, et al., Plaintiffs-Appellants,

v.

CLEAR CREEK INDEPENDENT SCHOOL DISTRICT, Defendant-Appellee.

No. 89-2638

United States Court of Appeals,
Fifth Circuit

Nov. 24, 1992

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before REAVLEY, GARWOOD and BARKSDALE, Circuit Judges.

REAVLEY, Circuit Judge:

In *Jones v. Clear Creek Independent School Dist.*, 930 F.2d 416 (5th Cir. 1991) (*Jones I*), *vacated*, 505 U.S. ___, 112 S.Ct. 3020, 120 L.Ed.2d 892 (1992), we held that Clear Creek Independent School District's Resolution[1] permitting public high school seniors to choose student

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[1] The Resolution provides:

1. The use of an invocation and/or benediction at high school graduation exercise shall rest within the discretion of the graduating senior class, with the advice and counsel of the senior class principal;

2. The invocation and benediction, if used, shall be given by a student volunteer; and

3. Consistent with the principle of equal liberty of conscience, the invocation and benediction shall be nonsectarian and non-proselytizing in nature.

volunteers to deliver nonsectarian, nonproselytizing invocations at their graduation ceremonies does not violate the Constitution's Establishment Clause. In applying the tripartite test of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971), we reasoned that the Resolution has a secular purpose of solemnization, that the Resolution's primary effect is to impress upon graduation attendees the profound social significance of the occasion rather than advance or endorse religion, and that Clear Creek does not excessively entangle itself with religion by proscribing sectarianism and proselytization without prescribing any form of invocation. *Jones I*, 930 F.2d at 419-23.

Then, in *Lee v. Weisman*, 505 U.S. ___, 112 S.Ct. 2649, 120 L.Ed.2d 467, 60 U.S.L.W. 4723 (1992), the Supreme Court held that Robert E. Lee, a public-school principal acting in accord with the policy of his Providence, Rhode Island school district, violated the Establishment Clause by inviting a local clergy member, Rabbi Leslie Gutterman, to deliver a nonsectarian, nonproselytizing invocation at his school's graduation ceremony. The Court reasoned that Lee's actions represent governmental coercion to participate in religious activities, a paradigmatic establishment of religion. The Court then granted certiorari in this case, vacated our judgment, and remanded it to us for further consideration in light of *Lee*, *Jones v. Clear Creek Indep. Sch. Dist.*, 505 U.S. ___, 112 S.Ct. 3020, 120 L.Ed.2d 892 (1992). Upon reconsideration, we hold that *Lee* does not render Clear Creek's invocation policy unconstitutional, and again affirm the district court's summary judgment in Clear Creek's favor.

1. THE SUPREME COURT TELLS THIS COURT WHAT THE ESTABLISHMENT CLAUSE MEANS

Of the six forms of argument recognized in constitutional interpretation,[2] it is the doctrinal arguments that control Establishment Clause cases.[3] Although the Supreme Court's doctrinally-centered manner of resolving Establishment Clause disputes may be credited with accommodating a society of remarkable religious diversity, it requires considerable micromanagement of government's relationship to religion as the Court decides each case by distilling fact-sensitive rules from its precedents.

For example, in *Lynch v. Donnelly*, 465 U.S. 668, 681-82, 104 S.Ct. 1355, 1363-64, 79 L.Ed.2d 604 (1984), the Court compared the effect that a city's display of a nativity scene had on the advancement or endorsement of religion to the effect of governmental actions that it had considered in previous cases, and concluded that display of the nativity scene did not violate the Establishment Clause. *Id.* at 687, 104 S.Ct. at 1366. Then, in *County of Allegheny v. ACLU*, 492 U.S. 573, 598-600, 109 S.Ct. 3086, 3103-05, 106 L.Ed.2d 472 (1989), the Court held that a county's display of a nativity scene violated the Establishment Clause because, *inter alia*, it was surrounded by

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[2] *See* PHILIP BOBBITT, CONSTITUTIONAL FATE 7, 93-94 (1982) (defining six categories of legitimate constitutional argument: historical, textual, structural, prudential, doctrinal, and ethical).

[3] *See* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 18-20 (1991) (employing an Establishment Clause hypothetical to explain doctrinal argument).

flora, instead of Santa Claus and reindeer as was the nativity scene at issue in *Lynch*.[4]

The Court has repeatedly held that the Establishment Clause forbids the imposition of religion through public education. That leads to difficulty because of public schools' responsibility to develop pupils' character and decisionmaking skills, a responsibility more important in a society suffering from parental failure. If religion be the foundation, or at least relevant to these functions and to the education of the young, as is widely believed, it follows that religious thought should not be excluded as irrelevant to public education. There is a deep public concern that radical efforts to avoid pressuring children to be religious actually teach and enforce notions that pressure the young to avoid all that is religious.[5]

Nevertheless, it is neither our object nor our place to opine whether the Court's Establishment Clause jurisprudence is good, fair, or useful. What the Establishment Clause finally means in a specific case is what the Court says it means. We sit only to apply the analytical methods sanctioned by the Court in accord with its precedent.

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[4] Some say that the Court has thus found a "three plastic animals rule" in the Constitution. Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U.CHI.L.REV. 115, 127 (1992).

[5] *See Board of Educ. of Westside Community Sch. v. Mergens*, 496 U.S. 226, 248, 110 S.Ct. 2356, 2371, 110 L.Ed.2d 191 (1990) ("[I]f a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion.").

II. FROM *LEMON* TO *LEE*

In *Jones I*, we applied *Lemon's* tripartite test[6] rather than the historical approach that the Court employed in *Marsh v. Chambers*, 463 U.S. 783, 792, 103 S.Ct. 3330, 3336, 77 L.Ed.2d 1019 (1983). *Jones I*, 930 F.2d at 419 (citing *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 383, 105 S.Ct. 3216, 3222 (1985), and *Edwards v. Aguillard*, 482 U.S. 578, 583 n. 4, 107 S.Ct. 2573, 2577 n. 4, 96 L.Ed.2d 510 (1987)). The *Lee* Court agreed that *Marsh*'s historical analysis is inappropriate, ___ U.S. at ___, 112 S.Ct. at 2660, yet it considered *Lemon* analysis unnecessary to decide whether *Lee* violated the Establishment Clause.[7] The Court instead held Lee's actions unconstitutional under a coercion analysis. *Id.* ___ U.S. at ___, 112 S.Ct. at 2655. At least four Justices would also hold that Lee's actions had the effect of unconstitutionally endorsing religion. *Id.* ___ U.S. at

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[6] *Lemon* holds that, to satisfy the Establishment clause, "a governmental practice must (1) reflect a clearly secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) avoid excessive government entanglement with religion." *Lee*, ___ U.S. at ___, 112 S.Ct. at 2654 (citations omitted).

[7] The Court stated:

> We can decide th[is] case without reconsidering the general constitutional framework by which public schools' efforts to accommodate religion are measured. Thus we do not accept the invitation of [Lee] and *amicus* the United States to reconsider our decision in *Lemon*. . . .

Id. ___ U.S. at ___, 112 S.Ct. at 2655; *but cf. id.* ___ U.S. at ___, 112 S.Ct. at 2685 (Scalia, J., dissenting) (equating Court's neglect of *Lemon* with rejection).

___, 112 S.Ct. at 2665 n. 9 (Blackmun, J., concurring), at ___, 112 S.Ct. at 2671-72 (Souter, J., concurring).

Thus, in the time between *Lemon* and *Lee*, the Court has used five tests to determine whether public schools' involvement with religion violates the Establishment clause. To fully reconsider this case in light of *Lee*, we reanalyze the Resolution under all five tests that the Court has stated are relevant.[8] We address any statements in *Lee* that bear on our analysis in *Jones I* and apply *Lee's* coercion test for the first time.

A. Secular Purpose

Nothing in *Lee* abrogates our conclusion that the Resolution has a secular purpose of solemnization, and thus satisfies *Lemon's* first requirement. *See Jones I*, 930 F.2d at 419-21. The Resolution represents Clear Creek's judgment that society benefits if people attach importance to graduation. A meaningful graduation ceremony can provide encouragement to finish school and the inspiration and self-assurance necessary to achieve after graduation, which are secular objectives.

The *Lee* Court stated that the Providence school district's solemnization argument would have "considerable

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[8] *See Lynch*, 465 U.S. at 679, 104 S.Ct. at 1362 (Establishment Clause "erects a 'blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship' " and Court is "unwilling[ ] to be confined to any single test or criterion in this sensitive area") (citations omitted); *Lee*, ___ U.S. at ___, 112 S.Ct. at 2661 ("Establishment Clause jurisprudence remains a delicate and fact sensitive one. . . . ").

force were it not for the constitutional constraints applied to state action. . . . " ___U.S. at ___, 112 S.Ct. at 2660. The Court did not question its members' previous acknowledgements that solemnization is a legitimate secular purpose of ceremonial prayer. *See Allegheny*, 492 U.S. at 595, n. 46, 109 S.Ct. at 3102 n. 46; *id.* at 630, 109 S.Ct. at 3120-21 (O'Connor, J., concurring); *Lynch*, 465 U.S. at 693, 104 S.Ct. at 1369-70 (O'Connor, J., concurring); *see also Engel v. Vitale*, 370 U.S. 421, 435 n. 21, 82 S.Ct. 1261, 1269 n. 21, 8 L.Ed.2d 601 (1962). Thus, we take the *Lee* Court to agree with our holding in *Jones I* that a law may pass *Lemon's* secular-purpose test by solemnizing public occasions, yet still be stricken as an unconstitutional establishment under another test mandated by the Court. *See Jones I*, 930 F.2d at 420.

B. Primary Effect

In *Jones I*, we held that the Resolution's *primary* effect was to solemnize graduation ceremonies, not to "advance religion" in contravention of *Lemon's* second requirement. *Id.*, at 421-22. *Lee* calls into question three statements that we made in support of our advancement holding. We stated that graduating high school seniors would be less easily influenced by prayer than would be their junior schoolmates, *id.* at 421, but the Court held that all students under school supervision would be unduly influenced by Rabbi Gutterman's prayers. *Lee*, ___ U.S. at ___, 112 S.Ct. at 2658. We distinguished the graduation setting from the classroom setting because parents and guests are present only at graduation and school officials can pay much greater attention to individual students in the classroom than at graduation, *Jones I*, 930 F.2d at 422, but the

Court stated that the two settings are "analogous." *Lee*, ___ U.S. at ___, 112 S.Ct. at 2660. We stated that the brevity and infrequency of the permissible prayers under the Resolution tempered any advancement of religion, *Jones I*, 930 F.2d at 422, but the Court rejected a *de minimis* characterization of the brief prayers at issue in *Lee*. ___ U.S. at ___, 112 S.Ct. at 2659.

Lee commands that we not rely on these three points in deciding whether the Resolution's primary effect is to advance religion. Yet even without them, we remain convinced that the Resolution's primary effect is to solemnize graduation ceremonies.

The Resolution can only advance religion by increasing religious conviction among graduation attendees, which means attracting new believers or increasing the faith of the faithful. Its requirement that any invocation be nonsectarian and nonproselytizing minimizes any such advancement of religion. The *Lee* Court held that the nonsectarian nature of the prayers there at issue did not change the fact that Lee directed graduation attendees to participate in a religious exercise. ___ U.S. at ___, 112 S.Ct. at 2656; *see also id.* at ___, 112 S.Ct. at 2667-71 (Souter, J., concurring). Nevertheless, the nonsectarian nature of a prayer remains relevant to the extent to which a prayer advances religion.

The fact that *Lemon* only condemns government action that has the *primary* effect of advancing religion, *see Lemon*, 403 U.S. at 612, 91 S.Ct. at 2111, requires us to compare the Resolution's secular and religious effect. The Resolution may or may not have any religious effect. The students may or may not employ the name of any deity;

heads may or may not be bowed; indeed, an invocation may or may not appear on the program. If the students choose a nonproselytizing, nonsectarian prayer, the effect may well marshal attendees' extant religiosity for the secular purpose of solemnization; but no one would likely expect the advancement of religion by the initiation or increase of religious faith through these prayers. The Resolution's primary effect is secular.

C. ENTANGLEMENT

We held in *Jones I* that the Resolution's proscription of sectarianism does not of itself, excessively entangle government with religion. We know of no authority that holds yearly review of unsolicited material for sectarianism and proselytization to constitute excessive entanglement. *Cf. Weisman v. Lee*, 908 F.2d 1090, 1095 (1st Cir.1990) (Bownes, J., concurring) (finding excessive entanglement where school district directs that a prayer be given, chooses a clergy member to deliver the prayer, and requests that prayer be nonsectarian and nonproselytizing), *aff'd* ___ U.S. ___, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992); *id.*, at ___, 112 S.Ct. at 2617 (Souter, J., concurring) (state decisions as to sectarianism constitute illicit comparative theology). Moreover, nothing in *Lee* abrogates our reading of the Court's entanglement precedent to limit violative entanglement to *institutional* entanglement. *Jones I*, 930 F.2d at 423 (citing, *inter alia*, *Lynch*, 465 U.S. at 689, 104 S.Ct. at 1368 (O'Connor, J., concurring)). That a rabbi wrote and delivered the prayer at issue in *Lee* makes entanglement analysis relevant to that case, but the Resolution keeps Clear Creek free of all involvement with religious institutions.

D. ENDORSEMENT

Like *Lemon's* advancement test, the Court's endorsement analysis focuses on the *effect* of a challenged governmental action. This is why, perhaps mistakenly, we conflated advancement and endorsement analysis in *Jones I*. Because the Court has never tolerated a government endorsement of religion that is incidental to a primary secular effect, as it has with incidental religious advancements, we will not now compare endorsement to legitimate effects of the Resolution. *See Allegheny*, 492 U.S. at 595 & n. 46, 109 S.Ct. at 3102 & n. 46 (Justice Blackmun, writing for himself and Justice Stevens, rejects any and all government endorsement of religion).

From the Court's various pronouncements, we understand government to unconstitutionally endorse religion when a reasonable person would view the challenged government action as a disapproval of her contrary religious choices. *See Lee*, ___ U.S. at ___, 112 S.Ct. at 2665 n.9 (Blackmun, J., concurring) (unconstitutional endorsement when "government makes adherence to religion relevant to a person's standing in the political community") (quoting *Wallace v. Jaffree*, 472 U.S. 38, 69, 105 S.Ct. 2479, 2496, 86 L.Ed.2d 29 (1985) (O'Connor, J., concurring)); *Allegheny*, 492 U.S. at 631, 109 S.Ct. at 3121 (O'Connor, J., concurring) ("The question under endorsement analysis . . . is whether a reasonable observer would view [government action] as a disapproval of his or her particular religious choices. . . . ").

We may compare the Resolution to the facts in two somewhat similar cases where members of the Court discussed endorsement of religion. Both *Lee* concurrences

consider invocations directed by Lee to be unconstitutional endorsements of religion. ___ U.S. at ___, 112 S.Ct. at 2665-66 (Blakmun, J., concurring); *id* at ___, 112 S.Ct. at 2677-78 (Souter, J., concurring). These concurrences attracted the votes of four Justices,[9] including Justice O'Connor, who first articulated the endorsement test for the Court in *Lynch*, 465 U.S. at 688-89, 104 S.Ct. at 1367 (O'Connor, J., concurring). On the other hand, a plurality of the Court recently held that a public school does not unconstitutionally endorse religion by permitting a Christian club to meet on school grounds after class and recruit members through the school's newspaper, bulletin boards, public address system, and annual Club Fair, as long as the school accords equal privileges to other non-curriculum-oriented student organizations. *See Board of Educ. of Westside Community Sch. v. Mergens*, 496 U.S. 226, 247-53, 110 S.Ct. 2356, 2370-73, 110 L.Ed.2d 191 (1990).

To compare the Resolution with *Lee* and *Mergens*, we consider exactly what it does. Unlike the policy at issue in *Lee*, it does not mandate a prayer. The resolution does not even mandate an invocation; it merely permits one if the seniors so choose. Moreover, the students present Clear Creek with *their* proposed invocation under the Resolution, while in *Lee* the school explained its idea for an invocation to a member of an organized religion and directed him to deliver it. ___ U.S. at ___, 112 S.Ct. at

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[9] Justice Kennedy, writing for the Court, took no position on endorsement in *Lee*. Justice Scalia, writing for the four dissenters, found no endorsement on the facts in *Lee*. *Id.* ___ U.S. at ___, 112 S.Ct. at 2683-84 (Scalia, J., dissenting).

2652-53. The Resolution is passive compared to the governmental overture toward religion at issue in *Lee*.

Concerning endorsement, the instant case more closely parallels *Mergens* because a graduating high school senior *who participates in the decision as to whether her graduation will include an invocation by a fellow student volunteer* will understand that any religious references are the result of student, not government, choice. The *Mergens* plurality states the point directly:

> there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a non-discriminatory basis.

496 U.S. at 250, 110 S.Ct. at 2372. In *Jones I*, we recognized that invocations permitted by the Resolution "may" include supplication to a deity. 930 F.2d at 417 n.1. But the Resolution permits invocations free of all religious content, and the 1987 student proposal was acceptable to the plaintiff-appellants. *See id.* at 420 n. 3. The record does not disclose how each senior class chooses whether to include an invocation nor how the student volunteer who delivers the speech is chosen.[10] We can imagine

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[10] The appellants ask us to remand this case so that they can adduce evidence of unconstitutional applications of the Resolution. We understand our present task to be limited to

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discriminatory methods of implementing the Resolution that would make it a tool for governmental endorsement of religion, but the Resolution itself is constitutional unless there is no way to implement it on a non-discriminatory basis.

We think that Clear Creek does not unconstitutionally endorse religion if it submits the decision of graduation invocation content, if any, to the majority vote of the senior class. Clear Creek is legitimately concerned with solemnizing its graduation ceremonies, and the Resolution simply permits each senior class to decide how this can best be done. School districts commonly provide similarly secular criteria for the selection of other student graduation speakers, and no court has held that their religious speech at graduation represents government endorsement of religion.[11] *Cf. Guidry v. Broussard*, 897 F.2d 181, 192 (5th Cir. 1990) (relying on defendants' immunity to avoid deciding whether school liable for censoring valedictorian's religious graduation address). After participating in a student determination of what kind of invocation their graduation will contain, we do

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determining of the Resolution's facial constitutionality, and nothing in this case prevents the appellants from filing a declaratory judgment action if they believe that the Resolution has been unconstitutionally applied. *See Jones I*, 930 F.2d at 423-24.

[11] That some attendees choose to stand and remain silent during an invocation is indistinguishable from their decision to accord a standing ovation to a moving valedictory address with religious inferences.

not believe that students will perceive any more government endorsement of religion from the Resolution than do students in Westside Community schools who are regularly recruited during school hours to join a Christian club. Clear Creek students certainly perceive a less-direct relationship between state and religion under the Resolution than Providence students did before *Lee*. *See Lee*, ___ U.S. at ___, 112 S.Ct. at 2661 ("[A]t graduation time and throughout the course of the educational process, there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students.") (citing *Mergens*). We find no unconstitutional endorsement.

E. Coercion

Instead of directly considering any of the tests that we have previously discussed, the *Lee* Court invalidated the providence school district's policy on its evaluation of the coercive effect of Lee's actions. The Court held that Lee *coerced* graduation attendees to join in a formal religious exercise. *Lee*, at ___, 112 S.Ct. at 2655. The Court summarized its entire analysis of the constitutionality of the school policy at issue in *Lee* as follows:

> These dominant facts mark and control the confines of our decision: State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools. Even for those students who object to the religious exercise, their attendance

> and participation in the state-sponsored religious activity are in a fair and real sense obligatory. . . .

Id. Thus, *Lee* identifies unconstitutional coercion when (1) the government directs (2) a formal religious exercise (3) in such a way as to oblige the participation of objectors. *See also Mergens*, 496 U.S. at 261, 110 S.Ct. at 2378 (Kennedy J., concurring) ("The inquiry with respect to coercion must be whether the government imposes pressure upon a student to participate in a religious activity.") Before *Lee*, no one contended that the Resolution coerced participation in prayer at Clear Creek's graduation ceremonies, and we failed to appreciate the need to address this issue from the Court's precedent that we discussed in *Jones I*. Upon considering this case in light of *Lee's* coercion analysis, we find that the Resolution does not succumb to one, let alone all three, of the elements of unconstitutional coercion, and thus survives the analysis that felled graduation prayer in *Lee*.

1. Direction

Throughout *Lee's* entire coercion analysis, the Court repeatedly stresses the government's direct and complete control over the graduation prayers there at issue as determinative of the establishment question. *E.g.*, ___ U.S. at ___, 112 S.Ct. at 2655 ("[G]overnment involvement . . . is pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school [which] suffices to determine the [constitutional] question. . . . "); *id.* at ___, 112 S.Ct. at 2656 (First Amendment does not "permit the government to undertake [the

task of defining common ground necessary for the spiritual development of humankind] for itself"); *id.* at ___, 112 S.Ct. at 2657 ("The degree of school involvement here made it clear that the graduation prayers bore the imprint of the State. . . . "); *id.* at ___, 112 S.Ct. at 2658 ("[I]f citizens are subjected to state-sponsored, religious, exercises, the State disavows its own duty to guard [its people's freedom of conscience]."); *id.* (a graduating senior at a Providence graduation ceremony would have "a reasonable perception that she is being forced by the State to pray"); *id.* at ___, 112 S.Ct. at 2659 ("[T]he State . . . in effect required participation in a religious exercise."); *id.* at ___, 112 S.Ct. at 2660 ("[T]he state-imposed character of an invocation and benediction by clergy selected by the school combine to make the prayer in state-sanctioned religious exercise. . . . "); *id.* at ___, 112 S.Ct. at 2661 ("the prayer exercises in this case are especially improper because the State has in every practical sense compelled attendance and participation in an explicit religious exercise. . . . ").

The Court deplored three instances of government involvement in graduation prayer in *Lee*, none of which is tolerated, let alone prescribed, by the Resolution. First, the Court found that Lee "decided that an invocation and benediction should be given; this is a choice attributable to the State, and from a constitutional perspective it is as if a state statute decreed that the prayers must occur." *Id.* at ___, 112 S.Ct. at 2655. The Resolution requires that the state *not* decide whether an invocation will occur; it respects the graduating class's choice on the matter. The Resolution acknowledges that a school official may offer "advise and counsel" to the senior class in deciding

whether to include invocations at graduation, and officials could exploit this clause to impose their will on the students. But, again,[12] in evaluating the Resolution's facial constitutionality, we are only concerned with whether the Resolution necessarily charges government with the decision of whether to include invocations. Unlike the policy at issue in *Lee*, the Resolution does not.

Second, the Court was critical of the fact that "[t]he principal chose the religious participant, here a rabbi, and that choice is also attributable to the State." *Id.* In contrast, the Resolution explicitly precludes anyone but a student volunteer from delivering Clear Creek's invocations. Moreover, the Resolution says nothing of government involvement in the selection of the person who delivers any invocation. That the government can remain detached from the selection consistent with the Resolution maintains the Resolution's facial constitutionality.

The Court recognized that Lee completed his control over the invocation at his school's graduation ceremonies when he "provided Rabbi Gutterman with a copy of the 'Guidelines for Civic Occasions,' and advised him that his prayers should be nonsectarian." *Id.* at ___, 112 S.Ct. at 2656. In three respects, Clear Creek exercises significantly less control over the content of invocations at its schools. Clear Creek does not solicit invocations; the Resolution only forbids Clear Creek schools from *accepting* sectarian or proselytizing invocations. Moreover, because a graduating senior drafts proposed invocations each year under the Resolution, the same person will never repeatedly

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[12] *See supra* note 10 and accompanying text.

propose an invocation. *Compare id.* (noting that Lee could refine an official prayer by repeatedly inviting the same clergy member to deliver invocations). Finally, the Resolution imposes two one-word restrictions "nonsectarian and nonproselytizing" which enhance solemnization and minimize advancement of religion, instead of a pamphlet full of invocation suggestions.

We conclude that Clear Creek does not direct prayer presentations at its graduation ceremonies.

2. *Religiosity*

Lee directed Rabbi Gutterman to pray, and the Court characterized this as a "formal religious observance." *Id.* at ___, 112 S.Ct. at 2655. By contrast, the Resolution tolerates nonsectarian, nonproselytizing prayer, but does not require or favor it.

3. *Participation*

The *Lee* Court held that government-mandated prayer at graduation places a constitutionally impermissible amount of psychological pressure upon students to participate in religious exercises. *Id.* at ___, 112 S.Ct. at 2658-59. We think that the graduation prayers permitted by the Resolution place less psychological pressure on students than the prayers at issue in *Lee* because all students, *after having participated in the decision of whether prayers will be given,* are aware that any prayers represent the will of their peers, who are less able to coerce participation than an authority figure from the state or clergy.

We also consider the age of the graduating seniors relevant to the determination of whether prayers under the Resolution can coerce these young people into participating in a religious exercise. *See Jones I*, 930 F.2d at 421. *Lee* explains that *the state-initiated clergy prayers there at issue* have a coercive effect on public-school students regardless of age, *see* ___ U.S. at ___, 112 S.Ct. at 2658-59 but it nowhere compromises the Court's previous recognition that graduating seniors "are less impressionable than younger students." *Mergens*, 496 U.S. at 235-37, 110 S.Ct. at 2364-65 (approving Congress' extension of the court's reasoning in *Widmar v. Vincent*, 454 U.S. 263, 274 n. 14, 102 S.Ct. 269, 276-77 n. 14, 70 L.Ed.2d 440 (1981), that age is inversely proportional to impressionability, from university students to secondary school students); *see also id.* 496 U.S. at 250, 110 S.Ct. at 2372 (endorsing Justice Powell's dissent in *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 556, 106 S.Ct. 1326, 1339, 89 L.Ed.2d 501 (1986)).

Accordingly, we think that the coercive effect of any prayer permitted by the Resolution is more analogous to the innocuous "God save the United States and this Honorable Court" stated *by and to* adults than the government mandated message delivered to young people from religious authority that the Court considered in *Lee*. *Cf. Lee*, ___ U.S. at ___, 112 S.Ct. at 2659 (refusing to "address whether [the choice between participation and protest] is acceptable if the affected citizens are mature adults").[13]

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[13] Nor did the Court criticize the fact that, before Rabbi Gutterman delivered the prayers ordered by Lee, the assembly

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None of *Lee's* three elements of coercive effect exist here. Prayers allowed under the Resolution do not unconstitutionally coerce objectors into participation.

III. FROM SEA TO SHINING SEA, GREAT GOD OUR KING[14]

The practical result of our decision, viewed in light of *Lee*, is that a majority of students can do what the State acting on its own cannot do to incorporate prayer in public high school graduation ceremonies. In *Lee*, the Court forbade schools from exacting participation in a religious exercise as the price for attending what many consider to be one of life's most important events. This case requires us to consider *why* so many people attach importance to graduation ceremonies. If they only seek government's recognition of student achievement, diplomas suffice. If they only seek God's recognition, a

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stood for the Pledge of Allegiance, which of course recounts our subjugation to a deity. *See id.* ___ U.S. at ___, 112 S.Ct. at 2653; *id.* at ___, 112 S.Ct. at 2682 (Scalia J., dissenting).

[14] America! America!
God shed His Grace on thee,
And crown they good with brotherhood
From sea to shining sea.
America the Beautiful

Long may our land be bright.
With freedom's holy light;
Protect us by Thy might,
Great God, our King.
America

privately-sponsored baccalaureate will do. But to experience the *community's* recognition of student achievement, they must attend the public ceremony that other interested community members also hold so dear. By attending graduation to experience and participate in the community's display of support for the graduates, people should not be surprised to find the event affected by community standards. The constitution requires nothing different.[15]

We again affirm the district court's judgment denying injunctive and declaratory relief from the Resolution.

AFFIRMED.

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[15] *Cf. Employment Div., Dept. of Human Resources v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990).

MERRIT E. JONES, on his behalf and as next friend of PAMELA JONES, a child, ET AL., Plaintiffs-Appellants, v. CLEAR CREEK INDEPENDENT SCHOOL DISTRICT, Defendant-Appellee.

No. 89-2638

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

December 28, 1992, Decided
December 28, 1992, Filed

JUDGES: Before REAVLEY, GARWOOD and BARKSDALE, Circuit Judges.

OPINIONBY: PER CURIAM; THOMAS M. REAVLEY

OPINION: ON SUGGESTION FOR REHEARING EN BANC

PER CURIAM:

Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Thomas M. Reavley
United States Circuit Judge

Judge KING and Judge DeMOSS did not participate in the consideration of the suggestion for rehearing en banc.

THE SUPREME COURT
OF THE UNITED STATES

Merritt E. JONES, et al., petitioners, v.
CLEAR CREEK INDEPENDENT
SCHOOL DISTRICT.

No. 91-310.

Case below, 930 F.2d 416.

June 29, 1992. On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Lee v. Weisman*, 505 U.S. ___, 112 S.Ct. 2649, ___ L.Ed.2d ___ (1992).

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-2638

MERRITT E. JONES, On His
Behalf and as Next Friend of
PAMELA JONES, A Child, ET AL.,

Plaintiffs-Appellants,

versus

CLEAR CREEK INDEPENDENT
SCHOOL DISTRICT,

Defendant-Appellee.

Appeal from the United States District Court for
the Southern District of Texas

(April 18, 1991)

Before REAVLEY, GARWOOD and BARKSDALE, Circuit Judges.

REAVLEY, Circuit Judge:

Graduating seniors and parents brought this suit to enjoin a school district from permitting invocations and benedictions at public high school graduation ceremonies. The district court held that the school district's written policy permitting only nonsectarian and non-proselytizing invocations and benedictions written and delivered by student volunteers at the ceremonies does not violate the Establishment Clause. We affirm.

I. BACKGROUND

Clear Lake High School ("Clear Lake") is within defendant-appellee Clear Creek Independent School District ("Clear Creek"). Clear Lake traditionally includes in its graduation ceremonies invocations and benedictions[1] voluntarily written and presented by members of the graduating senior class. Pre-1986 Clear Lake graduation invocations included overt references to Christianity. Clear Lake's 1986 graduation invocation mentioned "Lord," "Gospel," "Amen," and God's omnipotence. Two Clear Lake students, joined by their fathers, (collectively "Jones") complained that Clear Creek's policy and actions permitting invocations consisting of traditional Christian prayer at high school graduation ceremonies violated the First Amendment's Establishment Clause.

On December 15, 1987, three weeks before this case was to be tried, Clear Creek's Board of Trustees adopted a resolution (the "Resolution") which provides:

> 1. The use of an invocation and/or benediction at high school graduation exercise shall rest within the discretion of the graduating senior class, with the advice and counsel of the senior class principal;
>
> 2. The invocation and benediction, if used, shall be given by a student volunteer; and

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[1] Any definitional distinction between an invocation and a benediction is irrelevant to this case. We use "invocation" to describe the opening and closing parts of Clear Creek's graduation ceremonies wherein a student may request a deity's assistance or blessing. *See* WEBSTERS' NINTH NEW COLLEGIATE DICTIONARY 143 (1985) (defining benediction in terms of invocation).

> 3. Consistent with the principle of equal liberty of conscience, the invocation and benediction shall be nonsectarian and nonproselytizing in nature.

Clear Creek's Board of Trustees adopted the Resolution at the request of its attorney in this case, who drafted it to conform with Judge Merritt's opinion in *Stein v. Plainwell Community Schools*, 822 F.2d 1406, 1409 (6th Cir. 1987) (analogizing to the Supreme Court's approval of legislative prayer in *Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330 (1983) in holding that nonsectarian, nonproselytizing graduation prayer does not violate the First Amendment).

Applying the tripartite test announced in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105 (1971), Judge DeAnda held that the Establishment Clause does not prohibit Clear Creek from permitting invocations that conform with the Resolution, and granted summary judgment for Clear Creek.

II. ANALYSIS

Jones claims that the Resolution is a facially unconstitutional law respecting an establishment of religion. Alternatively, she asserts that the district court prematurely granted summary judgment without giving her an opportunity to discover whether Clear Creek would enforce the Resolution in a constitutional manner.

A. The Resolution's Constitutionality

1. Establishment Clause Applicability

The First Amendment's proscription of laws "respecting an establishment of religion" applies to state

governments through the Fourteenth Amendment. *Everson v. Board of Education of Ewing Township*, 330 U.S. 1, 15, 67 S.Ct. 504, 511 (1947). Because Clear Creek's Board of Trustees promulgated the Resolution pursuant to authority conferred by Texas law, the Resolution is subject to Establishment Clause scrutiny. *Board of Education, Island Trees Union Free School Dist. v. Pico*, 457 U.S. 853, 864, 102 S.Ct. 2799, 2806-07 (1982).

The Resolution does not escape Establishment Clause scrutiny by only passively limiting students' free choice of graduation speech content. True, the Resolution contemplates invocations written and delivered by student volunteers only with the approval of the graduating senior class. But, according to Clear Creek's May 1987 letter to parents, "commencement is a scheduled school activity, and all school regulations [are] enforced." Clear Creek undisputably controls its commencement programs. Clear Creek's rental of an auditorium is tantamount to ownership for purposes of facility control. And " 'the State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated' " . . . "as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46, 103 S.Ct. 948, 955 (1983) (quoting *United States Postal Service v. Council of Greenburgh Civic Assns.*, 453 U.S. 114, 129-30, 101 S.Ct. 2676, 2684 (1981)).

The Resolution is subject to Establishment Clause scrutiny because it is the mechanism through which the

state provides space in a closed forum for arguably religious speech at a government sponsored event. *See Engel v. Vitale*, 370 U.S. 421, 430, 82 S.Ct. 1261, 1266-67 (1962) (noncompulsory nature of public school prayer does not "free it from the limitations of the Establishment Clause"); *Jager v. Douglas County School Dist.*, 862 F.2d 824, 831 (11th Cir.) (considering Establishment Clause challenge "[w]hen a religious invocation is given via a sound system controlled by school principals and the religious invocation occurs at a school-sponsored event at a school-owned facility"), *cert. denied*, 490 U.S. 1090, 109 S.Ct. 2431 (1989); *Stein*, 822 F.2d at 1407 (recognizing Establishment Clause challenge where graduation invocations voluntarily written and presented by students).

The Resolution also involves Clear Creek in graduation invocations by subjecting proposed invocations to review by the "senior class principal," a faculty representative of a class throughout its four-year attendance at school.

2. Test of Constitutionality

The parties argued the Resolution's constitutionality under *Marsh* while the district court applied *Lemon* in deciding Clear Creek's summary judgment motion. Judges of the other two circuits considering the constitutionality of invocations at public high school graduation ceremonies have demonstrated some disagreement on the test to be applied. *Compare Weisman v. Lee*, 728 F Supp. 68, 71-75 (D.R.I.), *aff'd*, 908 F.2d 1090 (1st Cir. 1990) (applying *Lemon*), *cert. granted*, 59 U.S.L.W. 3635 (1991) *with Stein*,

822 F.2d at 1409 (one judge analogizes to *Marsh* and the other two judges apply *Lemon* as well).

The writer of this opinion is inclined to the opinion that present Supreme Court decisions require that the Resolution satisfy *Lemon*. The Supreme Court has "particularly relied on *Lemon* in every case involving the sensitive relationship between government and religion in the education of our children." *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 383, 105 S.Ct. 3216, 3222 (1985); *see also id.* ("reaffirm[ing] that state action alleged to violate the Establishment Clause should be measured against the *Lemon* criteria"); *Wallace v. Jaffree*, 472 U.S. 38, 63, 105 S.Ct. 2479, 2493 (1985) (Powell, J., concurring) (extolling *Lemon's* analytical usefulness in deciding constitutionality of silent prayer in public schools).

In *Marsh*, the Court upheld the Nebraska legislature's practice of paying a Christian chaplain to begin sessions with an invocation due to the historical acceptance of this practice since our ancestors declared independence from England. 463 U.S. at 792, 103 S.Ct. at 3336. But the Court has later said that

> [s]uch a historical approach is not useful in determining the proper roles of church and state in public schools, since free public education was virtually nonexistent at the time the Constitution was adopted.

Edwards v. Aguillard, 482 U.S. 578, 583 n.4, 107 S.Ct. 2573, 2577 n.4 (1987).

3. Lemon Application

a. Purpose

Clear Creek satisfies *Lemon's* first prong by showing that the Resolution has "a secular purpose." 403 U.S. at 612-13, 91 S.Ct. at 2111. Clear Creek's Trustees need not have enacted the Resolution in furtherance of exclusively secular objectives. *Lynch v. Donnelly*, 465 U.S. 668, 681 n.6, 104 S.Ct. 1355, 1363 n.6 (1984); *accord Wallace*, 472 U.S. at 56, 105 S.Ct. at 2489. Though, "[w]hile the Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham." *Edwards*, 482 U.S. at 586-87, 107 S.Ct. at 2579.[2]

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[2] We believe that the Supreme Court's requirement of an actual secular purpose encompasses the allusions in prior cases to requirements of secular purpose preeminence. Justice O'Connor recently elaborated on *Lemon's* purpose test:

> the inquiry into the purpose [behind challenged state action] should be deferential and limited. . . . Even if the text and official history of a statute express no secular purpose, the statute should be held to have an improper purpose only if it is beyond purview that endorsement of religion or a religious belief "was and is the law's reason for existence." *Epperson v. Arkansas*, 393 U.S. 97, 108, 89 S.Ct. 266, 272, 21 L.Ed.2d 228 (1968).
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> . . . I have little doubt that our courts are capable of distinguishing a sham secular purpose from a sincere one, or that the *Lemon* inquiry into the effect of an enactment would help decide those close cases where the validity of an expressed secular purpose is in doubt. While the secular purpose

(Continued on following page)

Clear Creek contends that it includes invocations in its graduation ceremonies to solemnize these occasions. Justice O'Connor recognizes that such "government acknowledgments of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purpose[] of solemnizing public occasions." *Lynch*, 465 U.S. at 693, 104 S.Ct. at 1369 (O'Connor J., concurring in the judgment); *accord County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 109

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> requirement alone may rarely be determinative in striking down a statute, it nevertheless . . . reminds government that when it acts it should do so without endorsing a particular religious belief or practice that all citizens do not share.

Wallace, 472 U.S. at 75-76, 105 S.Ct. at 2499-500 (O'Connor, J., concurring in judgment). A majority of the Court cites Justice O'Connor's *Lemon* purpose analysis in *Edwards*, 482 U.S. at 587, 107 S.Ct. at 2579.

As articulated by Justice O'Connor above and the majority opinions in *Lynch*, *Wallace*, and *Edwards*, *Lemon's* purpose prong does not require a determination of whether challenged state action has a greater secular or religious purpose. The opinions that strike down legislation as having a "primary" or "preeminent" religious purpose do so only after analyzing each secular purpose claimed by the state and finding each illusory. *See, e.g., Edwards*, 482 U.S. at 585-94, 107 S.Ct. at 2578-83; *Stone v. Graham*, 449 U.S. 39, 41-42, 101 S.Ct. 192, 194 (1980); *Lubbock Civil -Liberties Union v. Lubbock Independent School Dist.*, 669 F.2d 1038, 1044 (5th Cir.), *reh'g denied*, 680 F.2d 424 (1982), *cert. denied*, 459 U.S. 1155, 103 S.Ct. 800 (1983).

That the *Lemon* Court required "a" secular purpose along with a "primarily" nonreligious effect further convinces us that we need not divine a state's primary purpose in promulgating a challenged law. *See Lemon*, 403 U.S. at 612-13, 91 S.Ct. at 2111.

S.Ct. 3086, 3102 n.46 (1989); *Stein*, 822 F.2d at 1409; *Weisman*, 908 F.2d at 1095 (Bownes, J., concurring).

Jones asserts that Clear Creek's solemnization rationale is only a pretext for the Resolution's introduction of prayer into public schools. But unlike the plaintiffs in *Wallace*, *Edwards*, or *Lubbock*, Jones offers no evidence of religious motivation through legislative history or overt religious references in the Resolution. In fact, through its student option, and the nonproselytization and nonsectarian mandates, the Resolution deemphasizes the religious significance of allowed invocations.

While the Resolution apparently tolerates invocations addressing a deity, we think that this is as consistent with the secular solemnizing purpose as any religious purpose. It is precisely in acknowledging a principle of transcendence, with simple terms of universal understanding – like "God" – that graduation attendees may perceive the profound social significance of the occasion. It is not implausible that Clear Creek's Trustees intended the Resolution to foster just such a perception in many, if not most, attendees. The Resolution's "reason or effect merely happens to coincide or harmonize with the tenets of some . . . religions." *Lynch*, 465 U.S. at 682, 104 S.Ct. at 1364 (citation omitted). We reject a reading of the First Amendment that would freeze either church and state or religion and politics into perpetually antagonistic postures.

Jones argues that Clear Creek may not employ religious means to accomplish goals that can be attained by non-religious means. *See Lubbock*, 669 F.2d at 1045. This court has even held that a statute cannot employ an

obvious religious means to serve otherwise legitimate secular interests. *Karen B. v. Treen*, 653 F.2d 897, 901 (5th Cir. 1981), *aff'd*, 455 U.S. 913, 102 S.Ct. 1267 (1982). But to say that the Resolution employs a "religious means" is to confuse purpose and effect analyses under *Lemon*. Unlike the laws at issue in *Lubbock* and *Treen*, the Resolution takes no position on whether a proposed invocation references a deity, and only seeks to limit sectarianism and proselytization. The Resolution does not employ an obviously religious means to solemnize Clear Creek graduation ceremonies.

Moreover, we are unaware of an exclusively secular equivalent for Clear Creek's solemnization choice. *See Lynch*, 465 U.S. at 716-17, 104 S.Ct. at 1382 (Brennan, dissenting) (as "ceremonial deism," invocations are "uniquely suited to serve such wholly secular purposes as solemnizing public occasions"). Jones offers no solemnization substitute other than a valedictory address, which Clear Lake supplemented in its 1986 program with an invocation. We do not consider invocations such as the 1987 proposal approved by Jones[3] any more secular for

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[3] Jones agreed that the following invocation is not offensive:

> We ask that people gathered here today be grateful for the faculty, the administration, and the students of Clear Lake High School. We are most thankful to live in a country which stresses the importance of individual freedom. Thank you for this wonderful year, for the friendship and fellowship that has grown among us, and for the memories that we will cherish forever. Thank you for our past experience, and please, help us all to be successful in the future.

veiling references to a deity in pronouns and hidden objects.

Because Clear Creek has a secular purpose for allowing invocations at its graduations, we agree with the district court that the Resolution satisfies *Lemon*'s first prong as a matter of law.

b. Effect

Jones urges us to follow *Weisman*, 728 F.Supp. at 73, in holding that the primary effect of nondenominational prayer at a voluntarily attended public high school graduation ceremony is to advance religion in contravention of *Lemon*'s second proscription. But

> [r]ather than mechanically invalidating all governmental conduct or statutes that confer benefits or give special recognition to religion in general or to one faith – as an absolutist approach would dictate – the Court [mandates scrutiny of] challenged legislation or official conduct to determine whether, in reality, it establishes a religion or religious faith, or tends to do so. . . .
>
> In each case, the inquiry calls for line-drawing; no fixed, *per se* rule can be framed. . . . The purpose of the Establishment Clause "was to state an objective, not to write a statute." . . . The Clause erects a "blurred, indistinct, and variable barrier *depending on all the circumstances of a particular relationship.*"

Lynch, 465 U.S. at 678, 104 S.Ct. at 1361-62 (quoting *Walz v. Tax Commission of City of New York*, 397 U.S. 664, 688, 90 S.Ct. 1409, 1411 (1970) and *Lemon*, 403 U.S. at 614, 91 S.Ct. at 2112) (emphasis added). The facts here differ from

those in *Weisman*, and we conclude that the Resolution's primary effect is not to advance or endorse religion.

Constitutional examples of governmental religious accommodation abound. Nebraska may pay a Protestant chaplain to open its legislature's daily sessions with an invocation. *Marsh*, 463 U.S. at 795, 103 S.Ct. at 3338. Our statutorily prescribed national motto is "In God We Trust." 36 U.S.C. § 186. The Pledge of Allegiance, recited daily by thousands of public school children, describes us as "One nation under God." *Lynch*, 465 U.S. at 676, 104 S. Ct. at 1361. We even begin each public hearing in federal court with the invocation "God save the United States and this Honorable Court."

The principal difference between the legislative prayer approved in *Marsh* and any prayer sanctioned by the Resolution is that the latter occurs during a public school function. We recognize that we are to be

> particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary.

Edwards, 482 U.S. at 583-84, 107 S.Ct. at 2577; *see also Lubbock*, 669 F.2d at 1043 (explaining special concern for governmental religious neutrality in public schools).

Yet the students affected by the Resolution are the least impressionable people receiving special protection

from religious inferences under the Supreme Court's school prayer decisions. The graduation ceremony lies on the threshold of high school students' transitions into adulthood, when religious sensibilities hardly constitute impressionable blank slates. All of the students will have seen United States currency, and many will have witnessed judicial or legislative proceedings. Given *Marsh*, these students enter an adult world in which they are expected to tolerate some governmental accommodation of religion.

In determining the Resolution's primary effect, we focus on an invocation's effect in the context of an entire graduation ceremony. *Lynch*, 465 U.S. at 679-80, 104 S.Ct. at 1362 ("[f]ocus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause"). Several characteristics combine to distinguish the Resolution's invocations from the school prayer stricken in *Engel, Stone, Wallace, Treen, Jager*, and possibly *Weisman*. While striking down a New York regulation prescribing a daily prayer for recitation by public school children, the Supreme Court even notes that

> [t]here is of course nothing in the decision reached here that is inconsistent with the fact that *school children and others* are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or *ceremonial* occasions bear no true resemblance to

> the unquestioned religious exercise that the State of New York has sponsored in this instance.

Engel, 370 U.S. at 435 n.21, 82 S.Ct. at 1269 n.21 (emphasis added).

Most students witness the invocations sanctioned by the Resolution once in four years, as opposed to daily or weekly. Consistent with the Resolution's nonproselytization requirement, the invocations are historically brief – under one minute. Students deliver the invocations in an assembly where many parents are present rather than a classroom setting, where the prospect of subtle official and peer coercion warrants stricter separation of the state from things religious.

Nor do we overlook Clear Creek's passive role in the invocation inclusion process. The Resolution facilitates invocations, but it leaves their existence, and reference to a deity, to the discretion of each graduating class and student volunteer. And

> to have forbidden "effects" under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence. As the Court observed in *Walz*, "for the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, *and active involvement* of the sovereign in religious activity." 397 U.S., at 668, 90 S.Ct., at 2111.

Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 337, 107 S.Ct. 2862, 2869 (1987) (emphasis added). Clear Creek's passive role distinguishes the state-sanctioned, officially written prayers stricken in *Engel*.

While a law's denominational neutrality and voluntary observance provisions are not enough alone to "free it from the limitations of the Establishment Clause," *Engel*, 370 U.S. at 430, 82 S.Ct. at 1266-67, these factors in concert with the others specified above mollify any advance or endorsement of religion consistent with the Resolution.

We think that the Resolution allows invocations to enhance the significance of graduation to attendees while minimizing any governmental advancement or endorsement of religion. The Resolution no more advances or endorses religion than the myriad of constitutional public religious accommodations cited above; given its solemnization function, the Resolution has a legitimate primary effect. *Accord Stein*, 822 F.2d at 1409 (approving nonsectarian public high school graduation invocations for solemnization purposes); *Bogen v. Doty*, 598 F.2d 1110, 1114 (8th Cir. 1979) ("we suggest that establishing solemnity is the primary effect of all invocations at gatherings of persons with differing views on religion").

c. Entanglement

Jones argues that the Resolution's provision that invocations be nonsectarian and nonproselytizing constitutes an excessive entanglement of government and religion in violation of *Lemon*'s third proscription. We disagree.

"Entanglement is a question of kind and degree." *Lynch*, 465 U.S. at 684, 104 S.Ct. at 1365. Even if school officials review voluntarily submitted invocations for

sectarianism and proselytization,[4] any entanglement that this fosters is not constitutionally excessive. Such review must occur before the graduation ceremony, so the Resolution does not mandate the "continuing supervision of nonsecular activity" proscribed in *Lubbock*. *See* 669 F.2d at 1047 (school official monitoring of religious meetings excessive entanglement). In accordance with Jones' complaint, we consider the "activity" at issue here the invocation's delivery and not its approval and acceptance into the graduation program.

In his *Weisman* concurrence, Judge Bownes writes that an invocation policy in which speakers are chosen by the school district and given guidelines suggesting the content of prayers violates *Lemon*'s entanglement prong. 908 F.2d at 1095; *cf. Jager*, 862 F.2d at 831 (no entanglement when school does not choose invocation speaker or monitor content). The Resolution does not involve Clear Creek in choosing among those wishing to prepare and present graduation invocations, and Jones presents no evidence that Clear Creek is so involved. As for invocation content, the Resolution proscribes certain types of invocations without prescribing any invocation. We think that Clear Creek seeks to solemnize its graduation ceremonies in a manner most acceptable to all attendees, and in doing so may constitutionally pre-screen proposed invocations for sectarianism and proselytization.

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[4] The Resolution's third proviso may be understood as either an admonition to those student volunteers writing the invocations or as a mandate that school officials review proposed invocations for sectarianism or proselytization.

The Supreme Court has only held state action unconstitutional under *Lemon*'s entanglement prong when it has found excessive entanglement between governmental and religious institutions. *See Lynch*, 465 U.S. at 684, 104 S.Ct. at 1365 ("no evidence of contact with church authorities concerning the content or design or the exhibit prior to or since [city's] purchase of the créche"); *Larkin v. Grendel's Den*, 459 U.S. 116, 126-27, 103 S.Ct. 505, 511-12 (1982) (zoning ordinance allowing churches veto power over certain liquor licenses unconstitutional entanglement); *Lemon*, 403 U.S. at 625, 91 S.Ct. at 2117 (state salary supplements to teachers of secular subjects in parochial schools excessive entanglement); *Walz*, 397 U.S. at 674-75, 90 S.Ct. at 1414 (New York may constitutionally exempt religious organizations from real property tax).

Justice O'Connor states the proposition directly: "[t]he entanglement prong of the *Lemon* test is properly limited to institutional entanglement." *Lynch*, 465 U.S.at 689, 104 S.Ct. at 1368 (O'Connor, J., concurring); *accord* Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 Tex. L. Rev. 955, 971-75 (1989) (arguing that the original disestablishment decision sought to separate the institutions of church and state).

By requiring that invocations be nonsectarian and written and presented by student volunteers, the Resolution effectively excludes religious institutions from its purview. Such exclusion renders entanglement impossible under Justice O'Connor's statement of *Lemon*'s third test.

Thus, because the Resolution has a secular solemnizing purpose and primary effect, and does not excessively

entangle Clear Creek with religion, we agree with the district court that the Resolution does not violate the Establishment Clause.

B. Discovery Adequacy

Jones does not complain of any language included in a Clear Creek graduation ceremony after 1986 and agrees that the 1987 invocation was not offensive. Yet she asserts that the district court prematurely granted summary judgment based on the Resolution's constitutionality without giving her an opportunity to depose Clear Creek officials and discovery whether Clear Creek would constitutionally apply the Resolution. Jones characterizes the Resolution as Clear Creek's last minute attempt to dodge an injunction given its pre-1987 blatantly sectarian invocations.

Injunctive relief is inappropriate when sought to prevent injury that is speculative at best. *Carter v. Orleans Parish Public Schools*, 725 F.2d 261, 263 (5th Cir. 1984). Even where school districts have "*very reluctantly* complied with constitutional standards," this court has twice refused to reverse a district court's denial of equitable relief. *See Lubbock*, 669 F.2d at 1049 (emphasis in original); *Meltzer v. Board of Public Instruction of Orange County, Florida*, 548 F.2d 559, 568 (5th Cir. 1977), *aff'd on rehearing*, 577 F.2d 311 (1978), *cert. denied*, 439 U.S. 1089, 99 S.Ct. 872 (1979). We find no abuse of discretion, *see United States v. W.T. Grant Co.*, 345 U.S. 629, 633, 73 S.Ct. 894, 897 (1953), in the district court's final denial of injunctive and declaratory relief in this case.

III. CONCLUSION

Because the Resolution does not violate the Establishment Clause and the district court did not abuse its discretion in denying Jones equitable relief based on Clear Creek's pre-Resolution actions, we AFFIRM.

GARWOOD, Circuit Judge, with whom Barksdale, Circuit Judge, joins specially concurring.

The district court applied the tripartite test of *Lemon v. Kurtzmann*, 91 S.Ct. 2105 (1971), and upheld the school district's policy. Appellants do not argue that some other test should be applied, but rather contend that *Lemon* controls and that the policy fails to meet *Lemon*'s requirements. Appellees defend the policy under *Lemon* and also rely on *Marsh v. Chambers*, 103 S.Ct. 3330 (1983). Judge Reavley's opinion convincingly demonstrates that *Lemon* is satisfied, and we completely agree. Moreover, in the present context, it seems apparent that *Lemon* poses the challenged policy's highest hurdle, and if it clears *Lemon* then it passes establishment clause muster under any reasonably conceivable test. Accordingly, we join in so much of Judge Reavley's opinion as deals with whether the policy is constitutional under *Lemon*, but without reaching the question of whether some less restrictive or rigid test might be more properly applied in this setting.[1]

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[1] In *Lynch v. Donnelly*, 104 S.Ct. 1353, 1362 (1984), the Court observed that "we have repeatedly emphasized our

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That is a matter on which the Supreme Court may well further enlighten us before long. *See Weisman v. Lee*, 908 F.2d 1090 (1st Cir. 1990), *cert. granted* 59 U.S.L.W. 3635 (1991).

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unwillingness to be confined to any single test or criteria in this sensitive area." There are good arguments why a case of this kind might be better analyzed under *Marsh*, or some variant thereof, than under *Lemon*. See *Jager v. Douglas County School District*, 862 F.2d 824, 836-838 (11th Cir. 1988) (dissenting opinion of Chief Judge Roney); *Stein v. Plainwell Community Schools*, 822 F.2d 1406, 1409-10, 1412-15 (6th Cir. 1987) (opinions of Judges Merritt and Wellford); *Weisman v. Lee*, 908 F.2d 1090, 1098-99 (1st Cir. 1990) (dissenting opinion of Judge Campbell), *cert. granted* 59 U.S.L.W. 3635 (1991). It also appears to us that the force of certain of our precedents in this area, particularly *Lubbock Civil Liberties Union v. Lubbock Independent School District*, 669 F.2d 1038 (5th Cir.), *reh'g denied*, 680 F.2d 424 (1982), *cert. denied*, 103 S.Ct. 800 (1983), may have been called into question by *Board of Education of Westside Community Schools v. Mergens*, 110 S.Ct. 2356, 2366, 2370-73 (1990). Where that might lead were the policy at issue here somewhat different likewise need not be reached.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 89-2638

MERRITT E. JONES, on his behalf and as next friend of PAMELA JONES, a child, ET AL.,

Plaintiffs-Appellants,

versus

CLEAR CREEK INDEPENDENT SCHOOL DISTRICT,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Texas

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ON PETITION FOR REHEARING

(May 22, 1991)

Before REAVLEY, GARWOOD and BARKSDALE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

CLERKS NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

ENTERED FOR THE COURT:

/s/ Thomas M. Reavley
United States Circuit Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MERRITT E. JONES, On his behalf and as Next Friend of PAMELA JONES, A Child	§ § § §	CIVIL ACTION NO. H-87-1463
VS.	§ §	
CLEAR CREEK INDEPENDENT SCHOOL DISTRICT	§ § §	

MEMORANDUM AND ORDER

(MAY 16 1989)

Pending before the Court in the above referenced cause is Defendant Clear Creek Independent School District's motion for summary judgment. Plaintiffs filed this civil rights action on May 11, 1987, pursuant to 42 U.S.C. section 1983, challenging the constitutionality of Christian invocations and benedictions at the graduation ceremonies of public Clear Lake High School. On December 15, 1987, six months after this suit was initiated, the school district's Board of Trustees adopted a resolution permitting only nonproselytizing, nonsectarian invocations and benedictions, written by volunteer students, to be delivered at graduation exercises away from the high school's grounds. The court considered Defendant's motion for summary judgment during a conference on February 3, 1988, when the Court ordered Plaintiff to respond in writing and took the matter under advisement. Now, for reasons delineated below, after reviewing the record and the applicable law, the Court concludes that Clear Creek Independent School District's current

policy regarding commencement invocations and benedictions is constitutional. Accordingly, the Court is of the opinion that there is no longer a justiciable controversy in the case at bar and that as a matter of law summary judgment should be granted to Defendant.

The facts here are not disputed. This suit was originally filed on May 11, 1987, less than two weeks before a scheduled graduation ceremony, by senior student Pamela Jones and her father Merritt Jones. Plaintiffs withdrew their request for an injunction against the May 1987 invocation after reviewing the proposed statement and finding it to be unoffensive and nonsectarian, in contrast to the distinctly Christian prayer given at the previous year's ceremony. After Pamela graduated in 1987, with leave of Court an anonymous daughter and father, under the pseudonyms Jane and John Doe, were substituted as nominal Plaintiffs following a standing challenge because the Court found the issue to be "capable of repetition but evading review." *See Roe v. Wade*, 410 U.S. 113 (1973); *Grossberg v. Deusebio*, 380 F.Supp. 285, 292 (E.D. Va. 1974); *Stein v. Plainwell Community Schools*, 822 F.2d 1406 (6th Cir. 1987).

In contrast to the once bright-line wall of separation between church and state, the Court perceives in United States Supreme Court decisions over the past thirty-five years a growing emphasis upon accommodation between government and religion,[1] within the ambit of a required

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[1] In the context of kindergarten-twelfth grade public schools, *see, e.g., Everson v. Board of Education*, 330 U.S. 1 (1947) (permitting state transportation of children to and from

(Continued on following page)

policy of neutrality, as a frequently appropriate means to resolve tension between the free exercise and establishment clauses of the first amendment.

Justice Douglas declared thirty-seven years ago,

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of the government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.

Zorach v. Clauson, 343 U.S. 306, 313-14 (1952).

(Continued from previous page)

church-related schools); *Zorach v. Clauson*, 343 U.S. 306 (1952) (sustaining a released time program for children to attend religious classes off school grounds); *Board of Education v. Allen*, 392 U.S. 236 (1968) (allowing state-supplied secular textbooks for church-affiliated elementary schools; *Mueller v. Allen*, 463 U.S. 388 (1983) (upholding a Minnesota statute permitting tax deductions to parents for their children's educational expenses in any elementary or secondary school as promoting the secular goal of education).

We have long been used to "such government acknowledgement of religion as legislative prayers . . . , government declaration of Thanksgiving as a public holiday, printing of 'In God We Trust' on coins, and opening court sessions with 'God save the United States and this honorable Court.' Those government acknowledgements of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purpose of solemnizing public occasions, expressing confidence in the future and encouraging recognition of what is worthy of appreciation in society." *Lynch v. Donnelly*, 465 U.S. 668, 692-93 (1984) (O'Connor, Jr., concurring). Justice O'Connor recently proclaimed that "the Constitution . . . affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Id.* at 673. Her statement falls within a long line of Supreme Court acknowledgements of the traditional, cultural significance of religion in American life.

The Supreme Court has developed two key tests, both reflecting the spirit of accommodation and the growing perception of the wall of separation between church and state as a "blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship," in determining whether a law, program, or practice violates the establishment clause. *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971). Under the primary one, set out in *Lemon v. Kurtzman*, to avoid an establishment clause issue the court must find the challenged practice (1) to have a secular purpose, (2) with a principal effect of neither advancing nor inhibiting religion, and (3) to not foster an excessive entanglement of the state with religion. *Id.* at 612-13.

In *Lynch v. Donnelly*, the majority of the Supreme Court negated a per se rule or "absolutist" application of *Lemon* to establishment clause questions. 465 U.S. 668, 678 (1984) (rejecting establishment clause objection to a creche set up on public property at Christmas season). The Court defined, as an "absolutist" approach, one "mechanically invalidating all governmental conduct or statutes that confer benefits or give recognition to religion in general or to one faith." *Id.* at 679; *see also Mueller v. Allen*, 463 U.S. 388, 394 (1983) (a helpful signpost); *Meek v. Pittinger*, 421 U.S. 349, 359 (1975); *Hunt v. McNair*, 413 U.S. 734, 741 (1973). Instead, the challenged practice should be examined in context to evaluate its purpose and effect. *See, e.g., Bogen v. Doty*, 598 F.2d 1110, 1114-14 (8th Cir. 1979).

The other test, applied in *Marsh v. Chambers* when the Supreme Court sustained Nebraska's practice of opening its state legislature with daily prayer led by a chaplain paid from public funds, is based on historical practice. 463 U.S. 783 (1983). Because of the long history of such legislative prayers, the Supreme Court concluded that the framers of the Constitution did not intend and would not have considered this deeply rooted tradition, a national practice for over two hundred years, to be offensive to the establishment clause. *Id.*

Defendant's motion for summary judgment relied upon a Sixth Circuit case, *Stein v. Plainwell Community Schools*, 822 F.2d 1406 (6th Cir. 1987), the first federal appellate decision focusing upon the constitutionality of high-school, commencement invocations and benedictions. In that case, the appellate court held that graduation invocations should not automatically be deemed

unconstitutional. *Id.* at 1409. Analogizing the "solemnizing function" of invocations and benedictions at graduation exercises to the ceremonial prayer in legislative sessions in *Marsh* and applying the *Marsh* historical tradition test in a very generalized and expansive fashion, the Sixth Circuit ruled that such a practice can be constitutional if it "preserve[s] the principle of equal liberty of conscience" and does not "go beyond the American civil religion" into sectarian and/or proselytizing concerns. *Id.* at 1409. Clear Lake High School's recently adopted policy meets the nonsectarian standards set out in *Stein* and even echoes the court's language.

The facts in *Stein* were not disputed. Two public high schools in western Michigan included invocations and benedictions in their commencement ceremonies, at which attendance was voluntary and not a prerequisite for receipt of a diploma. At Plainwell High School, two unsupervised, volunteer students drafted and presented their own statements, while at Portage Central High School, graduating seniors for the previous fifteen years had asked local Christian clergymen to deliver an invocation and benediction. The court, referring generally to the tradition of ceremonial prayer in public circumstances to accommodate the multiplicity of religions in the United States, recognized its "guiding principle" as "equal liberty of conscience," which must be limited only when it oversteps "the common interest in public order and security" and thereby violates the establishment clause. *Id.* at 1408-09. The Sixth Circuit concluded that the contents of the challenged invocations and benedictions in *Stein* went beyond the acceptable bounds of this American civil religion, undefined by the court, and thus required that the

plaintiff's liberty of conscience give way to the state interest in "public order and tradition." *Id.* at 1409. Although noting there is less chance for religious indoctrination at a public ceremonial gathering in the presence of parents and other adults than in a closed class room with a supervising teacher as an authority figure, the court still decided that the actual language of the disputed invocations and benedictions constituted a government endorsement of exclusively Christian religion.

While this Court finds some of the Sixth Circuit's analysis of specific factors valuable, upon review of the law the Court concludes that the *Stein* court's approach through the *Marsh* traditional practice test is incorrect. First, the high school practice in the *Stein* schools as well as that in the case at bar existed at the longest for only a couple of decades. *Marsh's* concern with the framers' intent in drafting the first amendment and with the practices of their time is not relevant to contemporary public school graduation exercises.[2] Second, the Supreme Court has suggested that in establishment clause challenges affecting primary public schools, the appropriate test is the far more frequently used, fact-oriented *Lemon* evaluation. *See, e.g, Edwards v. Aguillard*, 107 S.Ct. 2573, 2577 n.4, 2578 (1987); *Grand Rapids School Dist. v. Ball*, 473 U.S. 373,

---

[2] Moreover, since formal education was largely conducted at religiously affiliated private schools at the time the Constitution was written, and since the secular public school did not come into existence until around 1840, efforts to determine the framers' intentions concerning them are merely speculation. *See* Wood, *Religion and Education in American Church-State Relations*, 26 T. Church & State 31 (1984); *See also, Schempp*, 374 U.S. at 238 (Brennan, J., concurring).

383 (1985). Accordingly, this Court has applied the *Lemon* test to the facts in the case at bar.

In regard to the first prong of the *Lemon* test, a solely secular purpose is not required. *Wallace v. Jaffree*, 105 S.Ct. 2479, 2490 (1985); *Lynch*, 465 U.S. at 681, n.6; *Abington School District v. Schempp*, 374 U.S. 203, 296-303 (1963) (Brennan, J., concurring). While a shared religious tradition is reflected in a brief, nonsectarian invocation, the Court finds that such a practice can ceremonially serve a legitimate, secular "solemnizing function," as suggested by Justice O'Connor, to add cultural significance to an important moment in the lives of graduates and their families without being pedagogical or proselytizing. *Lynch* 465 U.S. at 692-93.

The second prong of *Lemon*, requires that the primary effect of the practice neither advance nor inhibit religion. The *Lemon* test's focus upon factual circumstances permits a significant distinction between a flexible approach to nondenominational invocations by volunteer students at an optional graduation ceremony and the Supreme Court's hard and fast prohibition of activities suggestive of religious instruction or worship in the classroom during the vulnerable years of compulsory elementary and secondary education.

The United States Supreme Court has traditionally been extremely protective of primary and secondary school students in barring patently religious activities and instruction on school premises. *See, e.g., McCollum v. Board of Education*, 333 U.S. 203 (1948) (release-time program for religious instruction in public school classrooms violates establishment clause); school prayer cases,

including *Engel v. Vitale*, 370 U.S. 421 (1962) (daily recitation of nondenominational prayer, composed by state officials, in public schools is unconstitutional) and *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963) (invalidation of Pennsylvania State law requiring daily reading of ten Bible verses even though children could be excused from participation upon parental written request); *Stone v. Graham*, 449 U.S. 39 (1980) (striking down a Kentucky statute prescribing posting of Ten Commandments on every classroom wall); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (holding an Alabama statute mandating a moment of silence unconstitutional because legislative history revealed its sole purpose was to encourage and endorse religion); and *Edwards v. Aguillard*, 107 S.Ct. 2573 (1987) (Louisiana statute forbidding teaching of evolution without balancing instruction in "creation science" is unconstitutional because its primary purpose was to advance a particular religious belief). In recognition of the fundamental role of public schools in teaching and transmitting values, the courts have expressed as reasons for the special shielding of this captive and vulnerable student audience the expectations of families entrusting their children that public schools will not indoctrinate students with religious beliefs potentially contrary to their own; impressionability of youngsters; compulsory attendance; emulation of teachers as role models; and susceptibility of children to peer pressure. *See, e.g., Aguillard* 107 S.Ct. at 2577.

Many factors here distance the minimally involved school district from a potential perception of its graduation exercise as a state endorsement of religion. The Clear Lake High School graduation is held away from school

grounds at the University of Houston's Hofheinz Pavillion. The very brief invocation and benediction, given by volunteer students not daily, weekly, or monthly, but only once a year, are aimed at a largely adult audience of diverse religious beliefs which changes each time, thus diminishing any opportunity for indoctrination. Indeed, the graduating class is comprised of young adults, the majority over eighteen years of age, who are embarking upon careers in a multiform society in which they will be exposed to various sects and to which they presumably now bring developed ideas and a mature capacity to evaluate. The school district's policy, while not dictating the precise content of the invocation, insures that no individual faith is advanced at the expense of others. Not only is the inclusion of the invocation and/or benediction voluntary, dependent upon a student's willing involvement, but attendance at the ceremony is optional, is not necessary for graduation, and in fact does not guarantee that participants will receive their diplomas, which are sent out only to those who pass final examinations after the ceremony. While each factor alone is not dispositive, together the circumstances work against a simplistic characterization of the invocation or benediction as a dangerous government endorsement of religion.

The last prong of the *Lemon* test prohibits excessive entanglement of church and state. As noted above, the link between the school and the annual commencement program is minimal, with students voluntarily developing most of the content. Oversight by the graduating class's principal, who gives advice and consent to insure

that any proposed invocation or benediction is "consistent with the principle of equal liberty of conscience" and "nonsectarian and nonproselytizing in nature," is not sufficient entanglement to violate the establishment clause. Resolution of Board of Trustees of the Clear Creek Independent School District, December 15, 1987.

Accordingly, because the Court finds that the inclusion of a brief invocation and/or benediction in Clear Lake High School's graduation ceremony, under the facts presented here, does not as a matter of law violate the first amendment's establishment clause, the Court

ORDERS that summary judgment is GRANTED to Defendant and this case is DISMISSED with prejudice.

DONE in Houston, Texas, this 12th day of May, 1989.

/s/ James DeAnda
JAMES DeANDA
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MERRITT E. JONES, On his behalf and as Next Friend of PAMELA JONES, A Child	§	CIVIL ACTION NO. H-87-1463
VS.	§	
CLEAR CREEK INDEPENDENT SCHOOL DISTRICT	§	

FINAL JUDGMENT

(MAY 16 1989)

Pursuant to the Memorandum and Order signed on this date, the Court

ORDERS that final judgment is entered in favor of DEFENDANT Clear Creek Independent School District. Each party shall bear its own costs.

This is a Final Judgment.

DONE in Houston, Texas, this 12th day of May, 1989.

/s/ James DeAnda
JAMES DeANDA
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

Supreme Court, U.S.
FILED
MAY 17 1993
OFFICE OF THE CLERK

No. 92-1564

In The

Supreme Court of the United States

October Term, 1992

MERRITT E. JONES, individually; PAMELA JONES, by Merritt E. Jones, her father and next friend; JOHN DOE, individually; JANE DOE, by John Doe, her father and next friend,

Petitioners,

vs.

CLEAR CREEK INDEPENDENT SCHOOL DISTRICT,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Establishment Clause prohibits a school district from enacting a policy which permits student volunteers, at the election of the student class (and not school officials), to deliver nonsectarian, nonproselytizing benedictions at high school graduation exercises?

LIST OF PARTIES

Parties to the Proceedings Below:

(1) Merritt E. Jones, Plaintiff-Appellant

(2) Pamela Jones, Plaintiff-Appellant

(3) John Doe, Plaintiff-Appellant

(4) Jane Doe, Plaintiff-Appellant

(5) Clear Creek Independent School District, Defendant-Appellee

Amici Curiae in the Proceedings Below:

(1) Aldine Independent School District

(2) Alief Independent School District

(3) Alvin Independent School District

(4) Anahuac Independent School District

(5) Brazosport Independent School District

(6) Columbus Independent School District

(7) Deer Park Independent School District

(8) East Chambers Independent School District

(9) Humble Independent School District

(10) Katy Independent School District

(11) Klein Independent School District

(12) Rice Consolidated Independent School District

(13) Spring Independent School District

(14) Waller Independent School District

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APPENDIX

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No. 92-1564

In The

Supreme Court of the United States

October Term, 1992

MERRITT E. JONES, individually; PAMELA JONES, by Merritt E. Jones, her father and next friend; JOHN DOE, individually; JANE DOE, by John Doe, her father and next friend,

Petitioners,

vs.

CLEAR CREEK INDEPENDENT SCHOOL DISTRICT,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Clear Creek Independent School District respectfully requests that the Petition for Writ of Certiorari filed by Petitioners Merritt Jones, Pamela Jones, John Doe, and Jane Doe ("Petitioners") be dismissed on the grounds that it was untimely filed. Alternatively, Respondent requests that the Petition be denied since the Fifth Circuit's opinion below is not in conflict

with this Court's opinion in *Lee v. Weisman*, 112 S. Ct. 2649 (1992).

STATEMENT OF JURISDICTION AND MOTION TO DISMISS

The Fifth Circuit Court of Appeals rendered its initial opinion in *Jones v. Clear Creek Independent School District*, 930 F.2d 416 (5th Cir. 1991), on April 18, 1991, affirming the district court's order granting summary judgment in favor of Respondent Clear Creek Independent School District. This Court subsequently vacated the Fifth Circuit's opinion and remanded the case for consideration in light of *Lee v. Weisman*, 112 S. Ct. 2649 (1992).

On November 24, 1992, the Court of Appeals for the Fifth Circuit once again affirmed the district court's judgment in favor of Respondent. *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992) ("*Jones II*"). Thereafter, Petitioners filed a Petition for Rehearing *En Banc*, requesting reconsideration of the panel opinion by the full court. *See* Appendix A. The Court of Appeals overruled the Petition for Rehearing *En Banc* on December 28, 1992. *See* Appendix B.

On March 25, 1993 — approximately 120 days after the Fifth Circuit issued its opinion in *Jones II* — Petitioners filed their Petition for Writ of Certiorari seeking review of the Fifth Circuit's opinion. Petitioners have taken the position that their Petition for Rehearing *En Banc* constitutes a motion for panel rehearing for the purpose of tolling the ninety days within which a party may file a petition for writ of certiorari.[1] Supreme Court Rule 13.4, however,

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1. Petitioners have taken this position regardless of the plain language contained in their Petition for Rehearing *En Banc* wherein counsel for Petitioner states that "consideration by the full court is necessary to secure and maintain uniformity of decisions in this court." *See* Appendix A at p. 4a.

expressly provides that "[a] suggestion . . . for rehearing en banc . . . is not a petition for rehearing." Thus, the *Jones'* Petition for Writ of Certiorari is untimely because it was filed more than ninety days after the November 24, 1992, entry of the judgment that Petitioners seek to have reviewed. Respondent respectfully moves, therefore, for an order dismissing the Petition for Writ of Certiorari because it is untimely. In the alternative, Respondent opposes a grant of certiorari for the reasons set forth below.

STATEMENT OF THE CASE

Petitioner Merritt Jones is the father of Petitioner Pamela Jones. Pamela is a 1987 graduate of Clear Lake High School. Petitioner John Doe is the father of Petitioner Jane Doe. Jane is a 1988 graduate of Clear Lake High School. Clear Creek Independent School District is a duly constituted body politic with powers and jurisdiction pursuant to Texas law.

On May 11, 1987, Petitioners brought suit to enjoin Respondent from allowing prayers to be delivered at its high school graduation ceremonies. In particular, Petitioners complained of the invocation and benediction presented during the 1986 Clear Lake High School graduation ceremonies.[2]

Invocation

> Lord,
>
> Thank you for allowing us to obtain this milestone in our lives. Help us always to remember your great kindness and love

---

2. The parties dispute the exact wording of the invocation and benediction. Respondent's version is based on a videotape of the ceremony which was submitted as part of its summary judgment proof. The differences in the two versions, however, are generally minor.

whenever something great is accomplished in our lives. Some say high school years are a very painful, growing time. Undoubtedly, the many defeats, the disappointments, and mishaps that have occurred over the last four years would suggest this and even back it up. Yet when we take the time in the future to uncover our high school years in the vaults of our memories, the victories against all odds, the successes when defeat was imminent, and the friendships that will never, ever end will all shine through with a brilliant radiance of happiness that will only become more meaningful and beautiful as the years pass us by. Thankfully, nothing short of your awesome will and power will ever eclipse these great visions and memories. It is these unequivocal times that we are here to commemorate this afternoon. [Sentence unintelligible] Just bless and keep each of us over the years, until someday we all meet again. Amen.

Benediction

Let us pray.

Dear Lord,

As we emerge from a secluded high school please inspire us to greater heights and greater glories [unintelligible]. Instill in our spirit a sense of decency and pride. Inspire us to face all our challenges with confidence and turn obstacles into stepping stones to success. Let us look towards the future. Amen.

Petitioners have not complained of any invocations or benedictions since those delivered at the 1986 graduation ceremonies. In fact, Petitioners have admitted that both the invocation and benediction delivered at the 1987 ceremony were within constitutional parameters.

On December 15, 1987, Respondent adopted a resolution ("the Resolution"), formalizing its previously unwritten policy and practice, permitting the inclusion of invocations and benedictions at high school graduation exercises. The Resolution specifically provides that student volunteers may present nonsectarian, nonproselytizing invocations and/or benedictions at the discretion of the senior class.

On January 19, 1988, Respondent filed a Motion for Summary Judgment based on case law and the Respondent's Resolution. The district court concluded that Petitioner's suit no longer presented a justiciable controversy and, further, that Respondent was entitled to summary judgment as a matter of law.

REASON FOR DENYING THE WRIT

I.

THE FIFTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH THIS COURT'S DECISION IN *LEE V. WEISMAN* SINCE THE CASES ARE FACTUALLY AND, THEREFORE, LEGALLY DISTINGUISHABLE.

Petitioners erroneously assert that "[t]his case raises the same questions the Court answered in *Lee v. Weisman*" Petition at p. 9 (citation omitted). There, according to Petitioners, this Court concluded that "a religious exercise may not be conducted at a graduation ceremony." Petition at p. 9.

In fact, the *Lee* opinion does not announce a per se ban on the inclusion of prayer in graduation exercises. Rather, this Court's opinion repeatedly emphasizes that the Establishment Clause *prohibits clergy-delivered prayer* that is *initiated and directed by the state*. Since the Resolution at issue before this Court does not provide for state-initiated or state-directed prayer of any sort, the Fifth Circuit's analysis was not constrained by the *Lee* holding and, thus, the decision in *Jones II* does not conflict with *Lee*.

A. This Court's Holding in *Lee v. Weisman* Is Limited to the Facts of that Case.

Contrary to what Petitioners suggest, *Lee v. Weisman*, 112 S. Ct. 2649 (1992), does not announce an inflexible prohibition on all religious expression in school-related activities. In the *Lee* opinion, this Court emphasized that Establishment Clause jurisprudence is an area of "line drawing, of determining at what point a dissenter's rights of religious freedom are infringed by the State." *Id.* at 2661. Indeed, this Court expressly stated that its holding should be limited to the particular facts set forth in *Lee*:

> We do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive. People may take offense at all manner of religious as well as unreligious messages, but offense alone does not in every case show a violation. We know, too, that sometimes to endure social isolation or even anger may be the price of conscience or conformity. But, by any reading of our cases, the conformity required of the student *in this case* was too high an exaction to withstand the test of the Establishment Clause. The prayer exercises *in this case* are especially improper because the State has in every practical sense compelled attendance and participation in an

> explicit religious exercise at an event of singular importance to every student, one the objecting student had no real alternative to avoid.

Id. at 2661 (emphasis added).

Invocations and benedictions delivered at school-related activities and ceremonies are not — as Petitioners contend — inherently unconstitutional. Rather, the *Lee* opinion clarifies that it was the significant degree of "state involvement" in the preparation and delivery of the benediction and invocation that rendered that particular prayer unconstitutional.

> A school official, the principal, decided that an invocation and benediction should be given; this is a choice attributable to the State, and from a constitutional perspective it is as if a statute decreed that the prayer must occur. The principal chose the religious participant, here a rabbi, and that choice is also attributable to the State.
>
> The State's role did not end with the decision to include a prayer and with the choice of clergyman. [The principal] provided [the rabbi] with a copy of . . . [a pamphlet prepared by the National Conference of Christians and Jews entitled] "Guidelines for Civic Occasions," and advised him that his prayers should be nonsectarian. Through these means the principal directed and controlled the content of the prayer.

Id. at 2655-56. From those facts, this Court concluded that the

"degree of school involvement . . . made it clear that the graduation prayers bore the imprint of the State and thus put school-age children who objected in an untenable position." *Id.* at 2657.

B. *Jones* Is Factually Distinguishable from *Lee v. Weisman*.

Petitioners erroneously maintain that Respondent's Resolution "is not materially different from Providence's prohibited policy." Petition at p. 10. Notwithstanding Petitioners' characterization of the facts and Resolution at issue here, *Lee* is distinguishable in at least four very important respects.

First, unlike the prayers at issue in *Lee*, the benedictions and invocations delivered at Clear Creek Independent School District ("CCISD") high school graduation ceremonies are student generated, rather than the product of significant state involvement. The CCISD Resolution expressly provides that the use of an invocation and/or benediction at high school graduation exercises "shall rest within the discretion of the graduating senior class. . . ." *See* Appendix C. Second, the CCISD Resolution provides that the invocation and benediction, *if used*, shall be written and delivered by a student volunteer, as opposed to a member of the clergy. *Id.* Student volunteers, unlike members of the clergy, are not clothed with the indicia of religion.

Third, the students who participate in CCISD graduation exercises are high school seniors, normally eighteen years of age and adults in the eyes of the law, whereas the students who attended the promotion exercises in *Lee* were adolescents, primarily fourteen years old.[3] Fourth, CCISD high school graduation

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3. While this Court addressed both middle school and high school graduations, the evidence presented in *Lee* primarily pertained to middle school "promotional exercises." In fact, this Court took special note of the distinction between "mature adults" and "primary and secondary school children . . . [who] are often susceptible to pressure from their peers towards conformity." *Lee*, 112 S. Ct. at 2658-59.

ceremonies are traditionally conducted off campus. The promotion exercises in *Lee*, on the other hand, were conducted on school premises.

Petitioners argue in their Petition (as they did in the court below) that the above-referenced factors do not set this case apart from *Lee*. If anything, Petitioners argue, the CCISD Resolution is "more likely to be perceived as constituting a governmental endorsement of religion" than the policy and practice at issue in *Lee*. Petition at p. 17. Petitioners' position, however, completely ignores the thrust of this Court's opinion. The gravamen of the *Lee* opinion is the prohibition of *state* involvement in religious exercises. Nowhere in the opinion does the Court even begin to address prayer which is prepared and delivered outside the aegis of the state. In fact, a careful review shows that this Court took great pains to narrowly tailor the question presented in *Lee*, *i.e.*, "whether including clerical members who offer prayers as part of the official school graduation ceremony is consistent with the Religion Clauses of the First Amendment?" *Lee*, 112 S. Ct. at 2652. Likewise, the Court took great pains to narrowly tailor the reach of its holding: "These dominant facts *mark and control the confines of our decision:* State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools." *Id.* at 2655 (emphasis added).

In light of the factual distinctions addressed above, *Jones II* and *Lee* are not in conflict and, thus, the Petition for Writ of Certiorari should be denied.[4]

---

4. Although they have not couched the issue as an independent ground for granting review, Petitioners have, nevertheless, taken the Fifth Circuit to task for applying the so-called "endorsement" and "coercion" methods of analysis, in addition to the traditional three-part test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *See, e.g.*, Petition at p. 12. The Fifth Circuit's reference to alternate methods of analyzing Petitioners' Establishment Clause claims does not, however, justify Supreme Court review. The only issue here is whether the Fifth Circuit's decision is in conflict with *Lee*.

CONCLUSION

For the reasons set forth above, Respondent respectfully requests that the Petition for Writ of Certiorari should be dismissed for want of jurisdiction or, alternatively, denied.

Respectfully submitted,

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APPENDIX A — APPELLANTS' PETITION FOR REHEARING EN BANC DATED DECEMBER 7, 1992

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel hereby certifies that the following list of persons has an interest in the outcome of this case:

A. Plaintiffs below and appellants here are:

Merritt E. Jones
Pamela Jones
John Doe
Jane Doe

B. Defendant below and appellee here is:

Clear Creek ISD[1]

C. *Amici Curiae* in support of appellee (upon remand from the Supreme Court) are:

Aldine ISD
Alief ISD
Alvin ISD
Anahuac ISD
Brazosport ISD
Columbus ISD
Deer Park ISD
East Chambers County Consolidated ISD
Humble ISD

---

1 "ISD" is used throughout this pleading as an abbreviation for "Independent School District." All of the school districts listed in this certificate of interested persons are Texas school districts located in the Southern District of Texas.

Appendix A

Katy ISD
Klein ISD
Rice Consolidated ISD
Spring ISD
Waller ISD

D. The following attorneys represent the parties and *amici.*

1. Appellants' attorneys:

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/S/
Bruce V. Griffiths

Appendix A

STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision of the Supreme Court of the United States, and that consideration by the full court is necessary to secure and maintain uniformity of decisions of this Court:

Lee v. Weisman, 112 S.Ct. 2649 (1992).

I express a belief, based on a reasoned and studied professional judgment that this appeal involves one or more questions of exceptional importance:

> 1. Does the fact that a prayer included in the program at a public high school graduation ceremony is delivered by a graduating senior rather than a clergyman take the practice outside the holding of *Lee v. Weisman*, 112 S.Ct. 2649 (1992), that such prayers violate the Establishment Clause of the First Amendment?
>
> 2. May the Court of Appeals affirm a summary judgment that was granted three years before the Supeme Court announced the applicable legal standard without allowing the party against whom summary judgment was granted the opportunity to produce evidence relevant to the new standard?

/S/_____
Bruce V. Griffiths
Attorney of Record for Appellants

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STATEMENT OF THE ISSUES

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II. **THE SUPREME COURT'S DECISION IN *LEE V. WEISMAN* REQUIRES, AT LEAST, THAT THIS CASE BE REMANDED TO THE DISTRICT COURT SO THAT THE COURT MAY APPLY THE FACTS OF THIS CASE TO THE NEWLY ANNOUNCED LEGAL STANDARD.**

STATEMENT OF THE CASE

i. Statement of the Course of proceedings and disposition of the case.

This case arises out a lawsuit filed in the spring of 1987 by Merritt Jones and his daughter, Pamela Jones, then a senior at Clear Lake High School, a public high school near Houston, Texas. The Joneses[2] objected to and sought to enjoin the Clear Creek Independent School District's practice of having members of the graduating class deliver prayers at the high school's graduation ceremony. Approximately six weeks before the case was to be tried, the defendant school district adopted a formal resolution governing invocations at its graduation exercises, and, a few weeks later, moved for summary judgment on the basis that its

---

2. The Joneses were, during the pendency of the action, joined by another father and daughter who proceeded under the pseudonym of "John Doe" and Jane Doe." All four plaintiffs are hereafter referred to as "Jones."

policy, as set out in the school district resolution, was constitutional. The trial court canceled the trial setting and, 16 months later, granted the summary judgment for the school district.

Jones appealed and this Court affirmed, *Jones v. Clear Creek I.S.D.*, 930 F.2d 416 (5th Cir. 1991). Jones' suggestion for rehearing was denied and the plaintiffs applied to the United States Supreme Court for writ of *certiorari*. On June 29, 1992, the Supreme Court entered a brief order granting Jones' petition, vacating the judgment of this Court, and remanding for consideration in light of *Lee v. Weisman*, 112 S.Ct. 2649 (1992), which had been decided five days earlier.

On November 24, 1992, a panel of this Court issued an opinion, distinguishing the facts of this case from those of *Lee* and again upholding the judgment of the district court. In response to that decision, Jones files this petition for rehearing *en banc*.

ii. Statement of the Facts

For many years, it has been the practice at Clear Lake High School[3] for the high school graduation ceremony to include public prayers ("invocations" and "benedictions") delivered by members of the senior class. In 1986, Merritt Jones learned of this practice while attending the graduation exercise for his son. The following year, the year of his daughter Pamela's graduation, Jones contacted school officials and requested that the 1987 ceremonies not include prayers on the grounds that such religious activities by a public school district had the effect of endorsing religion and thus

---

3. Clear Lake High School is one of two high schools operated by appellee Clear Creek ISD.

violated the Establishment Clause of the First Amendment. When school officials refused to modify their policy, Merritt and Pamela Jones brought this action, seeking a temporary injunction barring the district from including prayers in the 1987 graduation ceremony. Jones withdrew his request for a preliminary injunction when the district agreed to include in the 1987 ceremonies an "invocation" which included none of the traditional attributes of a prayer, i.e., it did not address a deity, it did not invoke the name of God, Jesus, or any other religious figure, and it did not close with "amen" or any similar phrase. According to his affidavit in opposition to Clear Creek's motion for summary judgment, Jones agreed to the inclusion of this invocation in the 1987 ceremony not because the invocation was "non-denominational," but because the invocation was not, by his lights, a prayer at all. (R.181).

Pre-trial discovery showed that the program of Clear Lake High School had traditionally been established by an *ad hoc* committee of senior class officers and academic honorees (valedictorians), subject to the approval of the senior class principal (a school district administrator). (R.21-25) It also showed that the graduation ceremonies were clearly official school events sponsored and paid for by the school district. District administrators annually issued detailed directives to students and parents, setting out rules of dress and deportment for these ceremonies. (R.207-210). The 1987 directive stated, "The commencement is a scheduled school activity, and school regulations shall be enforced." (R.207). There is absolutely no evidence in the record that the Clear Lake High School graduation ceremony has been or has been perceived as being a public forum in which all comers can have access to the program to speak their minds. Rather, it is clearly a school event, sponsored by the school district and subject to its control, at which a small group of officially recognized representatives of the senior class are entitled to speak.

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On December 15, 1987, a few weeks before this case was set to be tried, the Clear Creek ISD school board adopted a resolution which, for the first time, enacted a written policy concerning graduation prayers. Its operative clauses read as follows:

> 1. The use of an invocation and/or benediction at high school graduation exercise shall rest within the discretion of the graduating senior class, with the advice and counsel of the senior class principal;
>
> 2. The invocation and benediction, if used, shall be given by a student volunteer; and
>
> 3. Consistent with the principle of equal liberty of conscience, the invocation and benediction shall be nonsectarian and nonproselytizing in nature.

(R.234).

Three weeks before the scheduled trial date, Clear Creek filed a motion for summary judgment with a copy of the resolution attached as the only exhibit. Jones opposed the summary judgment and sought a continuance so that he could do additional discovery on the issue of how this policy would actually be applied. (R.212-225). The question of the application of the policy was particularly problematic because the "whereas clauses" of the resolution suggested that the written policy was a codification of previous practice, while other evidence showed that in prior years the district had made no effort to enforce a requirement that the graduation prayers be nonsectarian. (R.180-183, 188-204, 21-25). The district court denied the opportunity to do additional discovery and granted the district's motion for summary judgment.

Appendix A

ARGUMENTS AND AUTHORITIES

I. THE RULE OF *LEE V. WEISMAN* PROHIBITS THE INCLUSION OF PRAYERS IN PUBLIC HIGH SCHOOL GRADUATION CEREMONIES EVEN IF THE PRAYERS ARE DELIVERED BY GRADUATING SENIORS RATHER THAN CLERGYMEN.

The district court, in its memorandum opinion granting the defendant's motion for summary judgment, acknowledged that the Supreme Court "has traditionally been highly protective of primary and secondary school students in barring patently religious activities . . .". (R.127) It distinguished the Clear Lake High School graduation exercises from these "protective" cases on seven grounds (R.128):

(1) The ceremonies were not held on the school campus;

(2) The prayers were very brief;

(3) They were only held once a year;

(4) The audience is older than the usual student body, consisting primarily of graduating seniors and their parents;

(5) The school district policy requires that prayers be nonsectarian;

(6) The prayer is delivered by a student volunteer; and

(7) Attendance at the high school graduation ceremony is not mandatory.

Appendix A

In *Lee v. Weisman*, 112 S.Ct. 2649 (1992), the Supreme Court, in holding a graduation prayer to be a violation of the Establishment Clause, expressly considered and rejected as important distinctions all but two of the factors listed in the district court's opinion. Specifically, the facts at bar differ from those in *Lee* in that the graduation in *Lee* took place on the school campus and that the prayers in question were delivered by a student rather than a clergyman.

On remand, the panel opinion of the Court of Appeals, while purporting to engage in a complex analysis of the rule of *Lee*, in fact seriously misreads that opinion and holds, essentially, that this case is different from *Lee* because students rather than a rabbi lead the prayers.[4]

Lee v. Weisman is only the latest Supreme Court decision holding that religious observances in public primary and secondary schools are particularly likely to run afoul of the Establishment Clause because the fact that school authorities exercise such extensive control over school activities means that religious activities in the public schools are highly likely to be perceived as being endorsed by school officials. In a recent, post-*Lee*, opinion, the Court of Appeals for the Sixth Circuit recognized the same point:

> Schools are not traditional public fora, and

---

4. The panel opinion also argues that student attendance was somehow more "coerced" in *Lee* than in *Jones*. (Slip Op. p.1022) This argument is difficult to understand because this Court's opinion in *Lee* holds that the fact that a student who objects to prayer at his graduation is put to the choice of listening to the prayer or not attending his high school graudation makes attendance mandatory, at least for purposes of determining the constitutionality of graduation prayers. Pamela Jones and Jane Doe, the graduating seniors in this case were put to exactly the same choice. There is no distinction between the two set of facts.

governments have much broader power over student speech than other types of private speech. "A school need not tolerate student speech that is inconsistent with its 'basic educational mission,' even though the government could not censor similar speech outside the school." *Hazelwood Sch. Dist. v. Kuhlmeier,* 484 U.S. 260, 266, 108 S. Ct. 562, 567, 98 L. Ed. 2d 592 (1988) (citation omitted). Moreover, "the Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. . . . Students in such institutions are impressionable and their attendance is involuntary." *Edwards v. Aguillard,* 482 U.S. 578, 583-84, 107 S. Ct. 2573, 2577, 96 L. Ed. 2d 510 (1987). "The Supreme Court has emphasized that the avoidance of religious divisiveness is nowhere more important than in public education, for 'the government's activities in this area can have a magnified impact on impressionable young minds. . . .' " *Mozert v. Hawkins County Bd. of Educ.,* 827 F.2d 1058, 1072 (6th Cir. 1987) (Kennedy, J., concurring) (quoting *School Dist. of Grand Rapids v. Ball,* 473 U.S. 373, 383, 105 S. Ct. 3216, 3222, 87 L. Ed. 2d 267 (1985)), cert. denied, 484 U.S. 1066, 108 S. Ct. 1029 (1988). *See also Lee v. Weisman,* 120 L. Ed. 2d 467, 112 S. Ct. 2649, 2658 (1992) ("There are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools.")

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Americans United for Separation of Church and State v. City of Grand Rapids, 1992 U.S.App. LEXIS 29934, p. 25 (6th Cir. November 16, 1992).

Because of the extent to which school officials may and, in fact, do control student speech in the course of school activities, *Hazelwood School District, supra,* a student leading a public prayer in the course of a high school graduation ceremony is more likely to be perceived as representing the governmental endorsement of religion than an outside clergyman who is not subject to control by school officials. In the primary and secondary school context, religious activities as part of an official school activity will almost always be endorsements of religion because schools are not traditional fora for free speech and students are not, therefore, inclined to distinguish between messages compelled by school authorities and ones merely permitted by them.

Indeed, the only Supreme Court case approving religious activities in the context of the public schools, *Westside Community Schools v. Mergens,* 110 S.Ct. 2356 (1990), rests its analysis largely on the fact that the religious clubs whose recognition it compelled were wholly student initiated and run, met outside normal school hours, were not led or sponsored by school officials, and were organized in schools which already recognized other non-curricular clubs. Clear Lake High School's graduation ceremony, like that in *Lee* and most public school graduation exercises, are clearly full-blown school functions that cannot be mistaken for a private student club, or an open forum. *Lundberg v. West Monona Community School Dist., 731 F.Supp. 331 (W.D.Ia. 1989).*

Neither would it be particularly significant, if it were true[5],

---

5. As the panel notes, at page 1021 of the slip opinion, the record does not (Cont'd)

that the senior class voted to have prayers in the graduation program. Any prayer included as part of the program of the official, governmentally sponsored and controlled graduation ceremony will be perceived by a reasonable observer as a governmental endorsement of religion and will therefore be unconstitutional. That conclusion is not changed by the fact that the school board has, at least formally, delegated its authority to decide what will be in the program to the senior class "with the advise and counsel of the senior class principal." It would require an abandonment of district control over the ceremony much greater than is indicated in this record before a reasonable observer could perceive these prayers as private and unofficial.

The fact that the *Lee* holding would not be different if the prayer had been led by a student instead of clergyman is additionally demonstrated by the Supreme Court's treatment of the Sixth Circuit's opinion in *Stein v. Plainwell Community Schools*, 822 F.2d 1406 (6th Cir. 1987), a case upholding graduation prayers delivered by a student volunteer. Both the majority and the dissent in the First Circuit's opinion in *Weisman v. Lee*, 908 F.2d 1090 (1st Cir. 1990) perceived *Stein* and *Weisman* as inconsistent, the Supreme Court apparently agreed and granted *certiorari* to resolve the conflict. *Lee, supra*, at 2655. Had the student prayer leader been enough to save graduation prayer, it seems likely that the Court would have explicitly distinguished *Stein* on that ground.

At the time of the original decision of this case, many

(Cont'd)
indicate how the "graduating senior class exercises its "discretion" to decide whether or not to have prayers in the graduation ceremony. In light of the fact that the school board resolution purports to be a codification of prior practice, it seems likely that the class does not vote, but that the class officers and valedictorians make the decision informally in consultation with the senior class principal.

observers anticipated that the Supreme Court would use *Lee v. Weisman* to repudiate the past thirty years of Establishment Clause jurisprudence. In fact, the Court used *Lee* to reaffirm its precedents and to hold that graduation prayers were unconstitutional. This Court is compelled by *stare decisis* to follow the holding of the Supreme Court and reverse the judgment of the district court.

II. THE SUPREME COURT'S DECISION IN *LEE V. WEISMAN* REQUIRES, AT LEAST, THAT THIS CASE BE REMANDED TO THE DISTRICT COURT SO THAT THE COURT MAY APPLY THE FACTS OF THIS CASE TO THE NEWLY ANNOUNCED LEGAL STANDARD.

In his original brief on appeal, Jones argued that the district court had erred in granting defendant's motion for summary judgment because he had been denied an opportunity to develop important factual issues when the court granted summary judgment based on the school district's eleventh hour adoption of a formal policy. Jones has always contended that there were material factual disputes which were relevant to the decision of this case and which precluded summary judgment. This argument is even stronger in the current posture of the case.

The panel opinion distinguishes this case from *Lee* on its facts, yet, not surprising, the facts in a five-year old summary judgment record that was created years before the applicable legal standard for graduation prayers was announced by the Supreme Court are somewhat sparse. The panel decided, in essence, that the involvement of the "senior class" in the decision to have prayers at graduation distinguishes this case from *Lee*, yet it admits that it does not know from the record how the senior class makes this decision. Assuming *arguendo* that some level of student decision-

making could distinguish this case from *Lee*, it might make a difference to the outcome of the case if during the five years since the adoption of the Resolution the decision to pray or not to pray (and who would conduct the prayer) has been made by school administrators in consultation with a small group of seniors (as had been done previously), as opposed to the decision being made in a democratic fashion. That fact is not in the record because at the time appellee moved for summary judgment the Resolution had never been carried out. Five Clear Lake High School graduations have taken place since the district filed its motion for summary judgment, and evidence as to how the Resolution works in practice is highly relevant to a just and legal resolution of this matter. The panel opinion based its decision on imagined facts when the actual facts are available on remand.

The panel opinion reveals another inappropriate reason for refusing to remand the case for a trial. In footnote 10 of the opinion, the Court states "We understand our present task to be limited to determination of the Resolution's facial constitutionality . . .". This understanding is mistaken. This lawsuit was not filed as a challenge to the facial constitutionality of the Resolution; it was and is an attack on the district's practice of permitting prayers during its graduation ceremony. Months after plaintiffs sued them, Clear Creek adopted the Resolution as a defense to the lawsuit and asserted its facial constitutionality as its sole grounds for summary judgment. Plaintiffs have always sought and continue to seek the opportunity to try their case and to prove that defendant's practice is violative of the Establishment Clause, whatever its formal policy may say.

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CONCLUSION

Jones respectfully prays that the Court of Appeals, for the reasons set forth in this petition grant a rehearing *en banc*, and upon said hearing, reverse the judgment below and remand for trial.

Respectfully submitted,

/S/
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CERTIFICATE OF SERVICE

I, Bruce V. Griffiths, hereby certify that I have served true copies of the foregoing petition for rehearing *en banc* on counsel of record by mailing same this seventh day of December, 1992.

/S/
Bruce V. Griffiths

APPENDIX B — PER CURIAM OPINION DENYING REHEARING

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-2638

MERRITT E. JONES, on his behalf and as next friend of PAMELA JONES, a child, ET AL.,

Plaintiffs-Appellants,

versus

CLEAR CREEK INDEPENDENT SCHOOL DISTRICT,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(OPINION NOVEMBER 24, 1992 5 CIR., 19___, ____F.2d____)

(December 28, 1992)

Before REAVLEY, GARWOOD and BARKSDALE, Circuit Judges.

PER CURIAM:

(X) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on

rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/S/

United States Circuit Judge

Judge KING and Judge DeMOSS did not participate in the consideration of the suggestion for rehearing en banc.

APPENDIX C — CLEAR CREEK INDEPENDENT SCHOOL DISTRICT RESOLUTION

RESOLUTION

STATE OF TEXAS §
§
COUNTY OF GALVESTON §

WHEREAS, invocations and benedictions have been a ceremonial tradition at graduation exercises in this District since its inception, and at public school commencements, generally, since the beginning of public schools in this country; and

WHEREAS, invocations and benedictions at graduation exercises serve to solemnize the occasion, expressing confidence in the future, and encouraging recognition of what is worthy in our society; and

WHEREAS, a controversy now exists regarding the use of invocations and benedictions at high school graduation ceremonies and the practice of this District in connection therewith; and

WHEREAS, to the extent there may be any misunderstanding, it is in the best interests of the students, their parents and the District, for this Board to make the practice of the District clearly and expressly known;

NOW, THEREFORE, be it resolved by the Board of Trustees of Clear Creek Independent School District that:

1. The use of an invocation and/or benediction at high school graduation exercises shall rest within the discretion of the graduating senior class, with the advice and counsel of the senior class principal;

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2. The invocation and benediction, if used, shall be given by a student volunteer; and,

3. Consistent with the principle of equal liberty of conscience, the invocation and benediction shall be nonsectarian and nonproselytizing in nature.

PASSED, APPROVED, AND ADOPTED this 15th day of December, 1987.

/s/
President, Board of Trustees

ATTEST:

/s/
Secretary, Board of Trustees

No. 92-1564

In the

Supreme Court of the United States

October Term, 1992

Merritt E. Jones, individually; Pamela Jones, by Merritt E. Jones, her father and next friend; John Doe, individually; Jane Doe, by John Doe, her father and next friend,

Petitioners,

v.

Clear Creek Independent School District,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION OF NATIONAL SCHOOL BOARDS ASSOCIATION TO APPEAR AS AMICUS CURIAE AND BRIEF AMICUS CURIAE OF NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONERS

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No. 92-1564

In the

Supreme Court of the United States

October Term 1992

Merritt E. Jones, individually; Pamela Jones, by Merritt E. Jones, her father and next friend; John Doe, individually; Jane Doe, by John Doe, her father and next friend,
Petitioners,

v.

Clear Creek Independent School District,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION OF NATIONAL SCHOOL BOARDS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF THE PETITION

The National School Boards Association (NSBA) respectfully moves this Court to grant it leave to file the attached brief as amicus curiae in the above captioned case.

Petitioners have consented to NSBA's participation in this matter. A letter attesting to their consent has been submitted to this Court. Respondents have refused consent.

NSBA is a nonprofit federation of this nation's state school boards associations, the District of Columbia school board and the school boards of the offshore flag areas of the United States. Established in 1940, NSBA is the only major national educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children. In carrying out this responsibility, school boards must set policy on a wide spectrum of issues, including appropriate practices at school activities such as graduation ceremonies.

In the wake of this Court's decision in Lee v. Weisman, 112 S. Ct. 2649 (1992), school boards across the country have been subjected to a barrage of emotionally charged and often well organized political pressure to maintain the traditional practice of invocations and benedictions at commencement ceremonies and other school activities. The efforts of school boards to understand the scope of and to comply with this Court's interpretation of the constitutionality of these practices have been immensely complicated by the lower court's decision in the case at bar. Its impact has reached far beyond the jurisdictional boundaries of the Fifth Circuit to exacerbate disputes at every level about the propriety of prayer at school events. Whatever their personal and political inclinations may be on this issue, school board members with virtual unanimity agree on

the need for additional guidance from this Court. Because this case has such direct bearing on how school boards will resolve this issue, NSBA respectfully requests the opportunity to advise this Court more fully of the urgency of review in this matter.

Respectfully submitted,

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112 S.Ct. 2649 (1992) . . . . . passim

OTHER AUTHORITIES:

"ACLU Says Medlock Wrong with School Prayer Opinion," Columbia, South Carolina Associated Press, 1/6/93 12

American Center for Law and Justice Bulletin 8/21/92 7

American Center for Law and Justice Bulletin 11/20/92 8

American Center for Law and Justice Bulletin 1992-1993 8

American Center for Law and Justice News Release 4/5/93 7,8

"Attorney General Disputes 'Loopholes' in Ban on School Prayer: A law center founded by TV evangelist Pat Robertson claims that school districts can get around the Supreme Court ruling on school prayer," Ann Arbor News, April, 1993 9

"Attorney General says Prayer at Athletic Events Legal," Rock Hill, South Carolina, Associated Press, 1/5/93 . . . 12

"Attorney Says Moment of Silence May Replace Graduation Prayer," Sheboygan, Wisconsin Associated Press, 4/14/93 . . . 9

"Board Opts for Students, not Clergy, to Lead Prayer at School Event," Dickinson, Texas, Associated Press, 2/23/93 9

"Can Religion, Graduation Mix?" UPI, 4/5/93 11

"Graduation Prayer Advocates Launch Self-Styled 'SWAT' Teams'," Education Daily, 4/6/93 9

"House Passes Bill for Policy on Prayer at School Athletic Events," Oklahoma City, Oklahoma, Associated Press, 3/13/93 . . 12

"Lawyer Attacks ICLA over Graduation Prayer Issue," Indianapolis, Indiana, Associated Press, 4/21/93 9

"Lexington School Board to Consider Reinstating Graduation Prayer," Lexington, Nebraska, Associated Press, 4/20/93 . . . 9

"Robertson Trying Again to Put Prayer in Schools," New York Times, 4/16/93 9

"School District Votes to Keep Prayer in Schools," Hilbert, Wisconsin, Associated Press, 1/20/93 9

"Students Can Decide Graduation Prayer Issue, Board Says," Goshen, Indiana, Associated Press, 4/13/93 10

"Students Considering Taking Prayer into Their Own Hands," Clearfield, Utah, Associated Press, 2/23/93 9

"Tennessee School Prayer: Senate Committee Gives Nod," Tennessean, 4/21/93 9

"Virginia Schools Struggle with Supreme Court Ruling on Prayer," Richmond, Virginia Associated Press, 4/19/93 10

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v.

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF AMICUS CURIAE OF NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF THE AMICUS

The National School Boards Association (NSBA) is a not-for-profit federation of this nation's 49 state school boards associations, the Hawaii State Board of Education, and the boards of education of the District of

Columbia, the U.S. Virgin Islands and the Commonwealth of Puerto Rico. Founded in 1940, NSBA represents approximately 97,000 of the nation's school board members, who, in turn, govern the schools attended by 97 percent of all U.S. public school children.

REASON FOR GRANTING THE WRIT

A religious war is being fought in the public school schools in this country between advocates of prayer at graduation and other school events (who interpret this Court's decision in Lee v. Weisman narrowly to preclude only clergy-led prayer at graduation ceremonies) and those who interpret Lee to preclude any direct involvement by school officials in prayer at any school event. This is not just a routine legal dispute. Both sides are using the public schools and public school children as tools to argue their respective sides of this issue. School boards are caught in the middle and do not know which way to turn. They are on the horns of a

dilemma: should they take the more conservative approach and treat Lee v. Weisman as precedent in guiding their decisions -- thus risking the wrath of constituents who cite the case at bar for the proposition that they have a "right" to pray at graduation or do they follow the advice of lawyers for religious interests who argue that Lee has limited value as precedent, applying only to the facts in that case -- thus risking a lawsuit by the ACLU which has threatened to file suit to protect the interests of those who do not support involvement of the schools in prayer at school events? Only this Court can solve this dilemma and NSBA urges the Court to do so, thus saving the schools from the onslaught of litigation and public dissension on this very emotional issue -- a raging controversy that has been intensified since the Fifth Circuit's decision in the case at bar.

ARGUMENT

Introduction

NSBA enters this case as an amicus only after grave consideration. Although this brief takes no position on the merits of the issue in this case (nor will amicus take a position in the event this Court grants the petition for certiorari), nevertheless, NSBA has, by filing a brief in support of the petition, taken a position in opposition to one of its members. NSBA takes that extraordinary step only because it believes that this issue cries out for a resolution. NSBA is aware of the advantage to this Court and to the law of allowing issues to percolate through the courts of appeals before final resolution by this Court. Unfortunately, this percolation process is causing great pain in the schools and is splitting communities apart. Both sides, of course, purport to speak with authority as to the state of the law and add more confusion than clarity to the

debate. Those supporting the decision below characterize their opponents as "anti-Christian," while those who contend that student-led prayer is unconstitutional maintain that their opponents are knowingly violating the law of the land.

I. The lower court decision calls into question the viability of this Court's decision in Lee v. Weisman, thus creating great confusion for those attempting to comply with Lee.

The Fifth Circuit has expressed its opinion in this case in a manner which implies that Lee v. Weisman, 112 S.Ct. 2649 (1992), may have been wrongly decided. Whether or not this Court agrees with the conclusions of the Fifth Circuit on the facts in this case, the somewhat disrespectful tone of the decision communicates the unfortunate message that this Court's decision in Lee is not "good law."

This intemperance of the lower court decision together with the immense degree of publicity engendered by advocacy groups has made judicious policymaking difficult, if not

impossible. Even where school boards disagree as a matter of policy with particular court decisions, they still want to obey the law and therefore seek legal advice. After Lee was decided, many school lawyers across the country in addressing the variety of factual questions that remained undecided took a conservative approach and advised their clients that direct school involvement in prayer at school activities raised serious implications. In many communities, this cautious interpretation is being overwhelmed by conflicting legal advice that school boards are receiving from interest groups who have elevated the importance of the decision in this case and expanded its impact far beyond the judicial boundaries of the Fifth Circuit.

II. The national publicity and community pressures resulting from the decision below has created a divisive national controversy detrimental to the operation of public schools across the country.

The conflicting pressure imposed by organizations representing religious interests

and those representing interests devoted to the "separation of Church and State" has turned public schools into a battlefield.

One national Christian legal organization, the American Center for Law and Justice (ACLJ), has dispatched an army of "SWAT teams" to "battl[e] it out in the nation's school districts . . . in a nationwide campaign to educate students about their constitutional right to pray and speak out about God at graduation ceremonies . . ." ACLJ News Release, 4/5/93. The mission of this well-funded organization is to fight for prayer in the schools. Since this Court's decision in Lee, the American Center for Law and Justice has sent numerous bulletins to every public school superintendent in the country, containing the Center's legal analysis of Lee and the decision below.

An August 21, 1992 bulletin supported a "See You at the [flag]Pole" event for students to "offer prayers for their school, teachers,

administrators and the nation." This letter described Lee as answering "only one question: Can school officials invite a member of the clergy to offer a prayer at a school sponsored event?" A November 20, 1992 bulletin begins with the proposition that "voluntary student-led prayer is constitutionally protected on public school campuses." It advocates student-led prayer at graduations and other school events. A bulletin was also sent in November of 1992 dealing with Christmas observances by public schools. A bulletin dated "school year 1992-1993" included an analysis of both Lee and the decision in this case and concluded that "students have the right to include an invocation and benediction in their graduation exercises."

By its own account, the ACLJ is currently involved in disputes relating to student-led prayer in more than 130 school districts in some 25 states. ACLJ News Release, April 5, 1993. News reports from across the country

lend credence to this statement. See, e.g., "Robertson Trying Again to Put Prayer in Schools," New York Times, 4/16/93; "School District Votes to Keep Prayer in Schools," Hilbert, Wisconsin Associated Press, 1/20/93; "Students Considering Taking Prayer into Their Own Hands," Clearfield, Utah, Associated Press, 2/23/93; "Board Opts for Students, not Clergy, to Lead Prayer at School Event," Dickinson, Texas, Associated Press, 2/23/93; "Attorney Says Moment of Silence May Replace Graduation Prayer," Sheboygan, Wisconsin, Associated Press, 4/14/93; "Students Can Decide Graduation Prayer Issue, Board Says," Goshen, Indiana, Associated Press 4/13/93; "Graduation Prayer Advocates Launch Self-Styled 'SWAT Teams'," Education Daily, 4/6/93; "Attorney General [of Michigan] Disputes 'Loopholes in Ban on School Prayer: A law center founded by TV evangelist Pat Robertson claims that school districts can get around the Supreme Court ruling on school prayer,"

Ann Arbor News, April, 1993; "Lexington School Board to Consider Reinstating Graduation Prayer," Lexington, Nebraska Associated Press, 4/20/93; "Tennessee Prayer" Senate Committee Gives Nod," Tennessean, 4/21/93; "Lawyer Attacks ICLU over Graduation Prayer Issue," Indianapolis, Indiana Associated Press, 4/21/93.

In Virginia, both the American Civil Liberties Union (ACLU) and the ACLJ have sent letters to school districts interpreting the Jones decision. "Virginia Schools Struggle with Supreme Court Ruling on Prayer," Richmond, VA, Associated Press 4/19/93. The ACLU has sent out a bulletin to school districts in a number of other states, challenging ACLJ's interpretation. A spokesman for ACLU said recently that any school district relying on the advice of the American Center for Law and Justice "will get its pants sued," "Can Religion, Graduation Mix?," UPI, 4/5/93.

A similar issue to the graduation prayer issue is also causing a great deal of dissension in the schools, that of prayer at athletic events. Both ACLJ and the ACLU have taken positions on this issue paralleling their positions on student prayer at graduation. ACLJ again interprets Lee as not reaching anything other than clerical prayers at graduation, and ACLU interprets the case to preclude "school sponsored" prayers at any school event.

The Fifth Circuit is the first circuit to decide the athletics issue, as well. In Doe v. Duncanville I.S.D., 1993 WL 67286 (5th Cir. 3/29/93), the circuit interpreted Lee to proscribe a girls' basketball coach from leading prayers before and after practice and at center court during half time and at the conclusion of the game. Circuit Judge Reavley, who also wrote the decision in the case at bar, stated in a footnote that the circuit court "eschewed the tripartite Lemon

analysis in favor of a more case-bound approach because we believe that a fact-sensitive application of existing precedents is more manageable and rewarding than an attempt to reconcile the Supreme Court's confusing and confused Establishment Clause jurisprudence." 1993 WL 67286, n. 7.

Meanwhile political activity is rampant on this issue as well. "Attorney General [of South Carolina] says Prayer at Athletic Events Legal," Rock Hill, S.C., Associated Press, 1/5/93; "ACLU Says Medlock Wrong with School Prayer Opinion," Columbia, S.C., Associated Press, 1/6/93; "House [in Oklahoma] Passes Bill for Policy on Prayer at School Athletic Events," Oklahoma City, OK, Associated Press, 3/13/93.

The decision in the case at bar has been elevated by the national debate and legal machinations of interest groups to a case of national importance and amicus submits that the benefit to be gained by awaiting

additional circuit court decisions on this issue does not justify allowing the continuance of the current division between schools and their communities on this issue. Public schools are used to controversy. Schools are often expected to be the progenitors of solutions to some of society's most contentious social issues, e.g., desegregation, AIDS, crime, drugs, and even asbestos. Perhaps the most wrenching issue of all, in any civilization, is religion. The schools need this Court to assist them in resolving the issue.

Conclusion

Amicus requests this Court to grant the petition for certiorari in order to settle the intense controversy over the permissible scope of official school district involvement in

prayer at school functions.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAY 27 1993
OFFICE OF THE CLERK

No. 92-1564

In The

Supreme Court of the United States

October Term, 1992

MERRITT E. JONES, individually; PAMELA JONES, by Merritt E. Jones, her father and next friend; JOHN DOE, individually; JANE DOE, by John Doe, her father and next friend,

Petitioners,

v.

CLEAR CREEK INDEPENDENT SCHOOL DISTRICT,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONERS' REPLY BRIEF

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QUESTIONS PRESENTED FOR REVIEW

Whether Clear Creek Independent School District's policy of allowing students to deliver prayers school officials approve as part of commencement exercises violates the Establishment Clause as a matter of law?

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No. 92-1564

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PETITIONERS' REPLY BRIEF

Petitioners' Reply to Respondent's Motion to Dismiss

Respondent's Brief in Opposition includes a motion to dismiss the petition for *certiorari*, based on the language of Supreme Court Rule 13.4, stating that the filing of a suggestion for rehearing *en banc* does not toll the 90-day time limit for filing a petition for *certiorari*. While respondent's position would be plausible if the language of Rule 13 had never been interpreted by the Court, it is clearly wrong in light of the Court's recent opinion in *Missouri v. Jenkins*, 495 U.S. 33 (1990), holding that a

"petition for rehearing *en banc*" treated by the court of appeals as incorporating a petition for rehearing by the panel did in fact toll the time for filing the petition for *certiorari*. The relevant procedural events in this case are indistinguishable from those in *Jenkins*, and respondent's motion must, therefore, fail.

In *Jenkins*, the petitioner State of Missouri filed a pleading in the court of appeals styled a "Petition for Rehearing En Banc," a title combining aspects of the "petition for rehearing" authorized by Rule 40(a) of the Federal Rules of Appellate Procedure and the "suggestion for rehearing in banc" provided for by Rule 35(b) of the rules. In the case at bar, petitioners' filing in the court of appeals was styled "Appellants' Petition for Rehearing *En Banc*." In *Jenkins*, the Supreme Court held unanimously[1] that the filing did include a petition for rehearing by the panel as well as a suggestion for rehearing in banc, based solely on the order of the court of appeals so characterizing its actions. The Court of Appeals for the Fifth Circuit, in accordance with its usual practice, *Gonzalez v. Southern Pacific Transportation Co.*, 773 F.2d 637 (5th Cir. 1985), expressly treated Jones' filing as containing both a petition for rehearing by the panel and for a rehearing *en banc* and denied both on December 28, 1992. (*Petition for Writ of Certiorari*, App. 22). 86 days later, on March 24, 1993, Jones filed his *certiorari* petition.

In counting the time during which his "petition for rehearing *en banc*" was pending as tolling the time to file

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[1] Justice Kennedy, joined by the Chief Justice and Justices O'Connor and Scalia, dissented on the merits, but explicitly endorsed the majority's resolution of the jurisdictional issue.

a petition for *certiorari*, petitioners relied on the Fifth Circuit's characterization of its own action read in conjunction with this Court's recent and highly relevant decision in *Missouri v. Jenkins*. Clear Creek Independent School District makes no attempt in its motion to dismiss to distinguish this case from *Jenkins*, indeed, it never cites it. The motion to dismiss should be overruled.

CONCLUSION

Petitioners request the Court deny the Respondent's Motion to Dismiss and grant the Petition for Writ of Certiorari.

Respectfully submitted,

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